Petition

81-1086

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARL THOMAS, SHERIFF,
Petitioner

v.

BENNY B. BARRETT, et al,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE IMMUNITY FLOWING FROM THE ELEVENTH AMENDMENT AGAINST LIABILITY UNDER SECTION 1983 EXTEND TO THE PETITIONER, THE ELECTED SHERIFF OF DALLAS COUNTY, TEXAS, WHERE, UNDER STATE LAW, THE SHERIFF IS A STATE OFFICER WHO PERFORMS STATE FUNCTIONS?

II.

DID THE PERSONAL ACTIONS INVOLVING DEMOTIONS, TRANSFERS, AND/OR TERMINATION OF EMPLOYMENT OF CERTAIN DEPUTY SHERIFFS BY THE SHERIFF OF DALLAS COUNTY, TEXAS, BASED ON CONSIDERATIONS SUCH AS PERSONAL LOYALTY AND NEED FOR HIGH DEGREE OF CONFIDENCE, AND PURSUANT TO STATE LAW WHICH PERMITS THE SHERIFF TO TERMINATE SUCH EMPLOYMENT AT HIS PLEASURE, OFFEND THE FIRST AMENDMENT'S GUARANTEES OF FREE SPEECH AND ASSOCIATION OF THE RESPONDENT AND THE CLASS?

III.

IN THE EVENT IT IS DETERMINED THAT THE PETITIONER WAS SUED IN HIS INDIVIDUAL CAPACITY, WAS IT ERROR FOR THE CIRCUIT COURT NOT TO REMAND THE CASE TO THE TRIAL COURT IN ORDER TO PERMIT THE PETITIONER TO ASSERT THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY WHICH WAS, AT THE TIME OF TRIAL IN 1979, NOT REGARDED AS AN AFFIRMATIVE DEFENSE IN THE FIFTH CIRCUIT COURT OF APPEALS?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner CARL THOMAS respectfully prays that, pursuant to Rule 17, Rules of the Supreme Court, a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this proceeding which was rendered on July 10, 1981, because that decision conflicts with well settled law and deviates from decisions by this Court and because the issues raised have national significance.

OPINIONS BELOW

The series of Memorandum Opinions and judgment by the district court are unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 649 F.2d 1193 (1981) and appears at Appendix "A".

The Petitioner's Motion for Rehearing was denied on September 1, 1981. App. B. 656 F.2d 700 (unpublished opinion).

The trial court's Final Judgment, dated May 31, 1979, appears at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals was rendered on July 10, 1981. The Petitioner's Motion for Rehearing was denied on September 1, 1981. This Court's jurisdiction is invoked under Section 1254(1), U.S.C., Title 28.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

Suit was filed under Section 1983 in November 1977 by Benny B. Barrett, a former deputy sheriff of Dallas County, Texas, against Carl Thomas, Sheriff of Dallas County, seeking declaratory and injunctive relief, reinstatement, and damages arising out of his termination of employment on the alleged grounds of political patronage. The Defendant answered that the termination was based on good cause, unrelated to any political affiliation as provided by certain departmental regulations.

In January 1978, the District Court held that the departmental regulation upon which the Sheriff relied to discharge the petitioner was violative of the First Amendment as overbroad and vague. In April of that year, the petitioner's motion for class certification was approved. The matter proceeded to discovery and ultimately to trial in January 1979.

The jury found that political party affiliation was a motivating factor as to Barrett's transfer and demotion, but was not a motivating factor as to his dismissal. As to the class, however, the jury found that political party affiliation was a motivating factor as to the several transfers, demotions, and dismissals, which would not have taken place in the absence of this political affiliation. The District Court fashioned relief by finding that Barrett was entitled to back-pay, but not reinstatement. As the prevailing party, Barrett and the class were awarded attorney's fees. Attorneys fees on appeal are now before the trial court.

In April 1979, Dallas County moved to intervene on the issue of quantum of attorney's fees and the class action aspect of relief. The County's position was that its interest in protecting the County treasury against the plaintiffs' claims entitled it to intervene. The District Court denied the County's motion. The trial court then ordered reinstatement of nine deputies, and established back-pay entitlement to fourteen members of the twenty-eight member class. Attorney's fees in excess of $34,000 were awarded. The District Court stated that the judgment "is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." Appendix C. The District Court later held that county funds would not be subject to satisfy the award of attorney's fees.

On appeal, the Court of Appeals held that the terminations were improper and that the sheriff was not entitled to raise for the first time on appeal his defense of qualified immunity. The appellate court also decided that Sheriff Thomas was jointly liable with the County for the attorney's fee award. (App. A) On September 1, 1981, the Court of Appeals denied the Sheriff's Motion for Rehearing. (App. B)

On October 2, 1981, the Court of Appeals rejected both the Petitioner's Motion for Stay of Mandate and Motion to Reconsider Denial of Rehearing en banc.

B. Statement of Facts

On January 1, 1977, Carl Thomas became the Sheriff of Dallas County, Texas, following his election to this county office in the Fall of 1976. He served a four-year term. He initiated several personnel changes in order to achieve greater efficiency in general and to place in certain positions those individuals requiring the utmost in personal loyalty and confidence.

The Respondent was initially transferred in March, 1977, from the Criminal Investigation Division to the Warrants Division (a less sensitive position) with no diminution in salary. On August 16, 1977, he was demoted to a detention officer and transferred with a loss in pay. In response to these acts, Barrett first sought out the news media (August 20, 1977), and Dallas County Commissioners Court (the legislative body for county matters), as forums to criticize severely the Sheriff and his policies. The discussion with the news media also included two highly insulting remarks about the Sheriff. Others in the Department were likewise transferred and demoted, some choosing to leave the employment of the Sheriff's Department altogether. These individuals constitute the class as certified by the District Court.

Mr. Barrett's termination on August 23, 1977, was announced to him in a letter signed by the Chief Deputy and cited as the basis Barrett's insulting and abusive statements made to the press about the Sheriff. The Respondent referred to the Sheriff as "paranoid and having a Hitler

mentality." The authority cited was the Department's Code of Conduct, Sections 12 and 15. Section 12 dealt with control of releasing information and Section 15 with willful disobedience of Department regulations. At trial, it was established that Barrett was also terminated on the authority of General Rules One and Two which were in force at the time in question, but reduced to writing some time later. Rule One prohibited discussion of controversial matter with the press. And, Rule Two has the same prohibition as to such disclosures to other elected officials. Although all four regulatory provisions called for an employee to make a disclosure to his supervisor, the Respondent failed to do so.

REASONS FOR GRANTING THE WRIT

The personnel decisions taken by the Petitioner in 1977 upon assuming the elective position of Sheriff of Dallas County, Texas were those of a state officer and thus entitled to Eleventh Amendment immunity. Also, the Petitioner's actions were consistent with both federal constitutional and state law in light of the state interest and the manifest need for selecting as his *alter ego* those deputies in whom he reposed personal trust and loyalty. Lastly, the refusal by the courts below to resolve the nature and extent of the Petitioner's liability, compounded by the denial of entitlement to the affirmative defense of qualified immunity, in the event the Sheriff is deemed to have been sued in his individual capacity, calls for this Court to consider the matters in this area of the constantly-changing contours of liability under the Civil Rights Act of 1871.

The courts below have left the Petitioner adrift on a sea of uncertainty. The national importance of Eleventh Amendment immunity [*Doyle*, infra], the role of state interest in law enforcement personnel decisions [*Kelley*, infra], and the

applicability of qualified immunity [*Gomez*, infra] are represented in this case. The Petitioner submits that guidance by this Court in these areas is vitally and absolutely needed and thus the Writ should be granted.

I.

Eleventh Amendment

AS AN OFFICER OF THE STATE OF TEXAS, THE PETITIONER IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AGAINST LIABILITY UNDER SECTION 1983.

The Petitioner urges as his first ground for granting the Petition for Writ of Certiorari his entitlement to immunity under the Eleventh Amendment as a state officer. This defense is raised for the first time on appeal and is based on a recent ruling by the U.S. Court of Appeals for the Fifth Circuit in another case which has the potential to effectuate a cardinal change in the area of liability of state officers under Section 1983 in Texas and elsewhere.

A. Importance and Novelty of Issue Warrants Its Consideration

The issue as to whether a Texas sheriff is a state officer for purposes of immunity under the Eleventh Amendment in a suit for damages under the Civil Rights Act of 1971 is an important issue worthy of consideration by this Court. The Court of Appeals, on August 24, 1981, in the case of *Van Ootegham v. Gray*, 654 F.2d 304 (5th Cir.) (en banc), launched what is regarded as a most significant exploration of the contours of civil rights liability along this fairly untrodden path. That en banc ruling remanded to the District Court for the Southern District of Texas for consideration, inter alia, of the issue as to whether Texas

counties are arms of the state. The court of appeals recognized that the entire matter was indeed "sensitive" but it declined to resolve the issue "without additional factual guidance and an express determination by the district court," (at 306).

The Petitioner regards this vital issue as one capable of appellate review by this Court, although the issue was not squarely presented at either the trial level or the appellate level. The issue was presented incident to the Motion for Reconsideration which was submitted in mid-September 1981.

In *City of Newport v. Facts Concerts, Inc.*, ... U.S. ....., 69 L.Ed. 2d 616, 624-26, 101 S.Ct. 2748 (decided June 26, 1981), this Court took note that ". . . those contours [of municipal liability under Section 1983] are currently in state of *evolving* definition and *uncertainty*." *id.*, 68 L.Ed.2d at 625 (emphasis added). This Court proceeded to review an issue involving a jury charge to which no objection had been made, "in order to resolve one element of the *uncertainty* . . ." *id.* (emphasis added).

B. Petitioner is Entitled to Eleventh Amendment Immunity

The Petitioner asserts that, as a state officer under Texas law, he is entitled to immunity provided by the Eleventh Amendment. A three-step process is utilized to develop this entitlement. At Appendix "D" is an overview of this process which is designed to highlight the salient points in the Petitioner's argument. Complete citations are to be found in the Table of Authorities.

1. STATE OFFICER

A sheriff, under Texas, law, is a state officer, based on the Texas Constitution, the state statutory scheme, as well as state and federal court decisions.

Article V of the Texas Constitution establishes the Judicial Department of the State. Section 23 thereof creates the office of the sheriff.

The state statutory scheme delineates the qualification for election, duties and power and in general provides exclusive authority for sheriffs of all 254 counties in Texas to act. No source of authority or power to act is derived from the county. The County, however, has a logistical and financial support role as to the sheriff and his personnel and operations. Thus, the sheriff indeed performs state-wide functions as a state actor whose constitutional and statutory duties are limited geographically to the county line. Moreover, his performance bond is payable to the Governor of the State of Texas, not to the County Commissioners Court (the local legislative body), as required by state law. Article 6866, V.A.C.S.

Bolstering this position is a consistent line of cases from both state and federal courts which hold that not only is the sheriff a state officer [*Clark v. Finley*, 54 S.W. 343 (Tex. 1899) (Sheriff of Tarrant County); *Doe v. Sullivan*, 472 F.Supp. 975, 978 (W.D. Tex. 1979) (sheriff of El Paso County)], but that the Texas county is an arm of the state, a political subdiv sion of the state. *Childress County v. State*, 92 S.W.2d 1011 (Tex. 1936); *Sullivan*, supra.

The composite picture formed by the above clearly shows that the sheriff is a state officer where:

a. This office is created by the state Constitution as within the State's Judicial Department;

b. The qualifications for this elective office are set by state law;

c. The host of civil and criminal duties/powers of the sheriff emanate exclusively from the state Legislature;

d. The Governor is the payee on the sheriff's performance bond;

e. Employment matters are regulated by state law; and

f. State and federal cases consistently hold that a sheriff is a state officer under Texas law.

The proposition that the Defendant is a state officer is buttressed by a long line of state (including the Supreme Court of Texas) and federal cases. A thorough treatment of this topic is found in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), dealing with the County Judge of Medina County, Texas. Because Judge Decker was acting in response to a state law (Section 4.28 of the Texas Education Code), the Fifth Circuit concluded that "... his duty in implementing Section 4.28, much like that of a *county sheriff in enforcing a state law*, may more fairly be characterized as the effectuation of the *policy of the State of Texas* embodied in that statute, for which the citizens of a particular county should not bear singular responsibility." (p. 404) (emphasis added).

The opinion's key phrase for our purposes is as follows:

> "Because of the *unique structure* of county government in Texas, the judge — like *other elected county officials*, such as the *sheriff* and treasurer — holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by *state statute* and is accountable to no one other than the voters for his conduct therein." (at p. 404) (emphasis added)

The evidence abundantly shows — and all parties seem in agreement — that this elected county official was acting pursuant to various provisions of state law incident to his decisions as to which deputies (a) would continue to serve as his alter ego and (b) in which capacities within the Sheriff's office.

It is well settled in Texas case law that elected county officials are, in effect, state officers who perform state functions within the confines of their respective counties. One of the first cases decided by the Texas Supreme Court on this issue held that a justice of the peace "is to all intents and purposes an officer of the state, and in exercising his function acts for the state, and not for the county." *Fears v. Nacogdoches County*, 9 S.W. 265 (1888). This principle has been held to apply to a Texas sheriff in *Clark v. Finley*, supra; 15 Tex. Jur. 2d Counties Section 65; *Conner v. Zackey*, 117 S.W. 177, 180 (Tex. Civ. App. 1909) (Treasurer). In *Jernigan v. Finley*, 38 S.W. 25 (Tex. 1896), the Supreme Court stated that it simply does not follow from the title of county treasurer that the incumbent is a county officer. More recently, the auditor of Harris County was held to be a state officer. *Harris County v. Fullerton*, 596 S.W.2d 572 (Tex. Civ. App. 1980), writ ref'd n.r.e.

The Fifth Circuit, in addition to the *Briscoe* decision, held in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980) that a district judge of Dallas County was actually a state officer for whom the County could not be held pecuniarily responsible where the judge was performing state functions.

2. COUNTIES AS ARMS OF THE STATE

a. *State Law*

The position that the Petitioner, as a state official, is entitled to immunity under the Eleventh Amendment is

strengthened because Texas counties are arms of the State. 15 Tex. Jur. 2d Counties, Section 1.

Using the Texas Constitution as our starting point, counties are described as "legal subdivision of the State" in Article XI, Section 1. What better expression of state law can be tendered on this point? The explanatory text to Section 1 states that: "In Texas, a county is an *involuntary* political subdivision of the *state*, an agency or arm of state government, created by the sovereign will for the purpose of discharging such governmental obligations of *the state* as . . . the administration of justice." (2 Vernon's Texas Constitution, p. 629 (1955)) (emphasis added).

Article IX of the Constitution provides the basis to create counties (Dallas County was created in 1846) and to remove county seats.

The Legislature has established a most elaborate scheme relative to these state subdivisions. Title 33 of the Civil Statutes (V.A.C.S.) details the organization of the counties, Title 34 deals with finances, Title 15 the District Attorney, Title 41 with the County Clerk, Title 44 with the Commissioners Court, Title 120 with the Sheriff, and Title 81 with jails. A comprehensive set of rules govern civil proceedings in county courts (Tex. R. Civ. P.) and the Code of Criminal Procedure provides state-wide rules as to criminal proceedings in the county courts, as well as specific duties for the Sheriff, in his role as a peace officer and a jailer.

State case law has found no reason to deviate from the above constitutional and statutory provisions. In *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966), the Supreme Court stated that a county in Texas "is a subordinate and derivative branch of *State* government." (emphasis added)

The Dallas Civil Court of Appeals, in *McCombs v. Dallas County*, 136 S.W.2d 975, 983 (1940), recognized that counties may be used by the Legislature as agencies for the discharge of state obligations. There, taxes were in issue. In *Limestone County v. Robbins*, 38 S.W.2d 580 (Tex. Comm. of App., 1931), it was held that Texas counties are indeed political subdivision of the state.

Prior to the *Avery* decision, our state's highest court held that counties lack general police power, but rather are tasked to carry out the role set by the Legislature. *Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). Accord, *Harper v. Lindsay*, 454 F.Supp. 597 (S.D. Tex. 1978); *Hill Farm, Inc. v. Hill*, 425 S.W.2d 414 (Tex. Civ. App. 1968); *In re Nueces County, Texas Road District*, 174 F.Supp. 846 (S.D. Tex. 1959); *Comm'r Ct. of Harris County v. Kaiser*, 23 S.W.2d 840 (Tex. Civ. App. 1929).

b. *U.S. Supreme Court*

A state, its agencies, and certain officials are absolutely immune from damages sought under Section 1983 because under the Eleventh Amendment a state is not a "person" within the meaning of the Civil Rights Act of 1871. *Quern v. Jordan*, 440 U.S. 332 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974).

This Court regards state law as highly relevant in resolving the applicability of this affirmative defense. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 279-81 (1977) (under Ohio law, city school board not entitled to Eleventh Amendment protection); *Moor v. County of Alameda*, 411 U.S. 693 (1973) (California county neither an arm of the state for diversity purposes nor a person for Section 1983 purposes).

c. *Fifth Circuit*

In 1971, the Fifth Circuit recognized, on the basis of state law, that Dawson County, Texas was a political subdivision of the state and thus immune from tort liability. *Rodriquez v. Medical Arts Hospital*, 437 F.2d 1203. Five years later that appellate court had the opportunity to determine the applicability of the Eleventh Amendment to Mississippi State University in *Jagnandan v. Giles*, 538 F.2d 1166. The court's exhaustive study of state law led it to conclude that the defendant in that Section 1983 suit over tuition payments was indeed a part of the state and that Mississippi had not waived its immunity.

The court, in *Giles*, did not wish to interfere with the state's political sovereignty, as protected by the Eleventh Amendment. As to waiver, the appellate court in *Dagnall v. Gegenheimen*, 645 F.2d 2 (5th Cir. 1981) held that such waiver must be express. Here, the state has not waived its Eleventh Amendment immunity from Section 1983 damage claims. [But see *Florida Nursing Home Assoc. v. Page*, 616 F.2d 1355 (5th Cir. 1980) where Eleventh Amendment waiver was found to exist under Florida law.]

The Fifth Circuit declined to decide whether Texas A and M University was entitled to Eleventh Amendment immunity as an arm of the state, because damages were not sought. *Gay Students Services v. Texas A and M University*, 612 F.2d 160, 164-65 (5th Cir. 1980). Subsequently, a federal district court ruled in an unrelated suit against the same university that the Eleventh Amendment applied. *Zentgraf v. Texas A and M University*, 492 F.Supp. 265 (S.D. Tex. 1980) (sex discrimination).

The Fifth Circuit has recently instructed a district court in Texas to explore fully this sensitive area. *Gray*, supra.

That court also, in *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981), applied the Eleventh Amendment in favor of a Texas hospital in an employment (racial discrimination) suit.

3. APPLICABILITY OF ELEVENTH AMENDMENT

The last component of the tri-part analysis deals with the applicability of the Eleventh Amendment to this defendant in particular and Texas counties in general. This Court has not yet ruled on whether a Texas Sheriff is a state officer for Eleventh Amendment purposes. Texas counties are no strangers to this Court, however. In *Avery v. Midland County*, 390 U.S. 424, 501-02 (1968), it was recognized that a Texas county "acts primarily as an administrative arm of the State."

a. *This Case*

In *Moor v. County of Alameda*, supra, this Court looked to state law to assist in the determination as to whether a county was an arm of the state for diversity purposes. There, David Moor, a resident of Illinois, contended that the county was a citizen of California. The county claimed that it was a mere arm of the state. After reviewing the state law, it was concluded that such law did not support the county's contentions. This Court employed the same approach in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) by referring to state law to resolve a similar contention by an Ohio school board.

Application of the approach utilized by the *Moor* and *Doyle* courts to the instant case leads to the inescapable conclusion that the Petitioner, as a state officer, is indeed entitled to Eleventh Amendment immunity. In addition to the above outline of state statutes, a recent enactment by

the Texas Legislature serves as an additional example as to the sheriff being not only a state officer, but also having major employment procedures controlled by the state, rather than by the County. The 67th Legislature at its Regular Session in 1981 enacted Article 2372h-8, granting Sheriffs' departments in counties with a population in excess of 1.5 million (this embraces Dallas County) the authority to create, establish, and dissolve a civil service system for the deputies and other departmental employees. [The Dallas County Sheriff's personnel recently voted overwhelmingly in favor of such a civil service system.] We see again the state controlling its officers and providing for employee relationships as to a component of its political subdivisions: the counties.

Also, the state agency established to monitor county jails provides the most detailed guidance for sheriffs in the operation of such detention facilities. For example, the Commission of Jail Standards has recently proposed as a rule which would require each sheriff to formulate and implement a written plan for inmate disciplinary proceedings. *Texas Register*, Vol. 6, No. 73, p. 3630-31 (September 29, 1981). The Commission (as might be expected) is to approve the plan, thus evincing additional state control over the Sheriff.

The Eleventh Amendment's purpose is to bar suits such as this when brought against a state officer, it is submitted. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Spicer v. Hilton*, 618 F.2d 232 (3rd Cir. 1980); *Jagnandon v. Giles*, 538 F.2d 1166 (5th Cir. 1976).

b. *Other Lower Court Decisions*

Applying the well-settled state law as to the nature of Texas counties and the Supreme Court of Texas' ruling

(which, it is noted, has certain precedential effect) that a sheriff is a state official to the instant defendant, it is urged that he be held entitled to Eleventh Amendment immunity where he is demonstrated to have been performing state functions. This suit is in effect a suit against the State of Texas. *Giles*, supra; *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980); *Hart v. Univ. of Texas at Houston*, 474 F.Supp. 465 (S.D. Tex. 1979) (hospital); *Doe v. Sullivan*, 472 F. Supp. 876 (W.D. Tex. 1979) (El Paso County); *Burkey v. Marshall County Board of Education*, 513 F.Supp. 1084 (N.D. W.Va. 1981) (county board of education held by state court to be arm of state and thus federal court so bound); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) (Arizona Board of Regents); *Vaughn v. Regents of Univ. of California*, 504 F.Supp. 1349 (E.D. Calif. 1981). Also, the Third Circuit recognized that such immunity applied in favor of a state university where state functions were being discharged. *Shawer v. Indiana Univ. of Penna.*, 603 F.2d 1161 (3rd Cir. 1979).

Although the Eleventh Amendment was not in issue, the case of *Fracaro v. Priddy*, 514 F.Supp. 191, 200-201 (M.D. N.C. 1981) shows the vital role of employing state law to determine whether the Director of the Stokes County Department of Social Services acted for the county or the state (which was not a party to the Section 1983 suit) when Mrs. Fracaro was fired. The court there concluded that the official was acting not for the county, but rather for the state of North Carolina in that situation.

Because state law is virtually dispositive of entitlement to Eleventh Amendment, there are naturally cases that fall on the other side of the line. For example, an Indiana County is not so protected [*Mackey v. Stanton*, 586 F.2d 1126

(7th Cir. 1978)]; to the same effect as to counties in Kentucky, see *Allsup v. Knox*, 508 F.Supp. 57 (E.D. Ky. 1980). Also, in *Broom v. Percy*, 470 F.Supp. 633 (E.D. Wisc. 1979), state prison officials were subject to suit under Section 1983; and in *Holley v. Lavine*, 605 F.2d 638 (2d Cir. 1979) a New York county official was not shielded by Eleventh Amendment in suit involving public assistance benefits.

c. *Summary*

Our ending point is our starting point: Texas counties are entitled to Eleventh Amendment immunity, as are its elected officials. As outlined by this Court, the role of state law is critical in resolving the applicability of the Eleventh Amendment. Here, Texas counties are unique and have been consistently held to be arms of the state by state court decisions. As such, the Sheriff, as an elected official, is entitled to Eleventh Amendment immunity where he is performing a state function and acting under authority of a state employment statute.

II.
FIRST AMENDMENT

PETITIONER'S PERSONNEL ACTIONS (DEMOTIONS, TRANSFERS, AND TERMINATION OF STATUS AS TO CERTAIN DEPUTY SHERIFFS) DID NOT OFFEND FIRST AMENDMENT INTERESTS OF THE RESPONDENT OR HIS CLASS.

This portion of the Brief sets forth the basis to justify the transfers, demotions, and ultimate termination of employment in the case of Barrett and several other deputies, in light of the state interests involved, the statutory discretion vested in the sheriff, and the status of Barrett and the class as non-tenured, confidential deputies.

A. The State Interest

The Constitution of the State of Texas provides in Section 23 of Article V, in part, that:

> "There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years and whose duties and prerequisites . . . shall be prescribed by the Legislature . . ."

The principal source of statutory authority relating generally to sheriffs appears in the Code of Criminal Procedure of 1965. As a peace officer [Article 2.12(1)], the Sheriff — along with his deputies — is charged with the duty to preserve the peace [Article 2.13]. Of grave importance is the legislative mandate that the sheriff be a conservator of the peace in his county and that he "arrest all offenders against the laws of the State . . .", in addition to his other law enforcement functions (Article 2.17) (See generally, 52 Tex. Jur. 2d, Sheriffs Part IV, Powers, Duties, and Liabilities).

Title 120, Vernon's Civil Statutes of Texas, sets forth other powers of the sheriff and, in particular, provides (a) that he may appoint deputies (Articles 6869, 6869a-d) and (b) that he is financially responsible for their official acts (Article 6870). (This last provision has been construed by both state and federal courts as not providing liability under the doctrine of respondant superior [*Rich v. Graybar Electric Co.*, 84 S.W.2d 708 (Tex. Comm. of App. 1955)].

Thus, by action of the State Legislature, political association does play a part of the governmental process in regards to employment practices of this elected county official.

A third and last major category of duties placed on the sheriff by the Legislature deals with the operation of the jail. The body of statutory responsibilities is found in Chapter 81, Vernon's Civil Statutes of Texas. Of prime concern to this appeal is the duty to supervise and control the jail (Article 5116, V.A.T.S., and Article 16.21, Code of Criminal Procedure; *Alberti v. Sheriff of Harris County*, 406 F.Supp. 649 (S.D. Texas 1975) and *Taylor v. Sterrett*, 600 F.2d 1135 (5th Cir. 1979) (and cases cited therein).

B. Employment Practices Under Article 6869, V.A.C.S.

Sheriff Carl Thomas was vested with the power to appoint deputies to serve during the pleasure of the Sheriff, as provided by Article 6869. In the exercise of this statutory authority, he decided to transfer, demote and/or fire certain members of the plaintiff class, as well as the Plaintiff-Respondent Benny Barrett. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980) (Sheriff's personnel actions upheld where the fired deputies failed to establish political animus). In *White v. Miss. State Oil and Gas Bd.*, 650 F.2d 540 (5th Cir. 1981), an "at will" employee was found to have no protected property interest. Accord, *Snell v. Hidalgo County Water Improvement District*, 507 F.Supp. 834 (S.D. Tex. 1981). These personnel decisions were wholly consistent with existing state and federal law, it is submitted.

A leading Texas court case in this field is *Murray v. Harris*, 112 S.W.2d 1081 (Tex. Civ. App.— Amarillo, 1938), writ dismissed, involving a suit by a deputy against the Sheriff of Carson County for termination of employment prior to the end of the Sheriff's term of office. Justice Stokes, after referring to the statutory scheme, stated:

> "Appointment of such officers therefore involves the *public welfare* which, no doubt, was in the minds of the legislators when they made provision that such deputies should hold their offices during the pleasure of their principals. By including such provision in the law, the Legislature established a public policy to the effect that officers elected by the people to discharge public trusts and upon whose shoulders rests the responsibilities for their proper discharge should be *free to select* persons of their own choice to assist him in the discharge of the duties of their offices." (p. 1093) (emphasis added)

The state court went on to address the plaintiff's claim of entitlement to continued employment for the duration of the Sheriff's elected term of office in these words:

> "We cannot accede to this contention. The effect of such a construction would be to *destroy the right preserved to the elected official*, to retain his subordinates during his pleasure. * * * The appointment of such subordinates involves the public funds, as well as the *public welfare*, and the public therefore has an interest which the Legislature sought to protect by vesting in the public official, chosen by the voters to serve them, with the power to terminate the employment of those selected to serve in such capacities at any time his judgment dictates to him that the *best interests of the public* demand a change in the personnel of such subordinates or that their services be entirely dispensed with." (emphasis added)

Lastly, Justice Stokes pointed out that the former deputy took the job subject to this statutory provision (Article 6869) which became a part of the contract of employment and, in practical terms, stated:

> "The appointed person, who is charged with knowledge of the provisions of the law, accepts *the precarious tenure* * * * and *must accept the consequences* of this

judgment when exercised to terminate the employment . . ." (at p. 1044) (citations omitted) (emphasis added).

In *White v. Thomas*, ... F.2d ..... (5th Cir. Nov. 6, 1981) (slip op. 79), the court rejected the plaintiff's contention that his termination as a deputy sheriff by Sheriff Thomas under Art. 6869, violated his property and liberty interests safeguarded by the Fourteenth Amendment where there was reasonable justification to fire Mr. White.

This state legislative provision permits the Sheriff not only to select those of certain political views [*McCormick v. Edwards*, 646 F.2d 173 (5th Cir. 1981), cert. pending, No. 81-383, 50 L.W. 3307], but also to fire those who undermine effectiveness and discipline [*Herrington v. Miss. Regional Medical Center*, 512 F.Supp. 1317 (S.D. Miss. 1981)] and those in whom the Sheriff lacks trust [*Sprague v. Fitzpatrick*, 546 F.2d 560 (3rd Cir. 1976)].

C. Constitutional Challenges

Outlined below are three principal areas of judicial concern involving public employment practices at issue here, namely, the specialized status of law enforcement organizations, the impact of "patronage" cases on this case, and conditions of employment primarily within the framework of the First Amendment.

1. *Law Enforcement Organizations*

The courts have been influenced to a great extent in giving cognizance to the role of state interest such as those outlined above in our society when passing upon their applicability to members of the law enforcement community.

This Court's decision in the New York state trooper case of *Foley v. Connelie*, 435 U.S. 291, 297-300 (1978) is of cardinal importance. There, a state statute restricting employment to U.S. citizens was upheld, as against an equal protection challenge. The holding in *Foley* gains added significance, it is submitted, when read in light of *Kelley v. Johnson*, 425 U.S. 238 (1976). In *Kelley* certain hair grooming regulations of the Suffolk County, N.Y. police department were challenged as violative of freedom of expression, due process, and equal protection. Of prime interest is the following passage from Justice Rhenquist's majority opinion which combines the role of the state interest in both the 1st and 14th Amendment areas:

> "Respondent has sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police force of Suffolk County, a subdivision of the State of New York. While the Court of Appeals made passing reference to this distinction, it was thereafter apparently ignored. We think, however, it is highly significant." (at p. 244-245).

As noted by Justice Powell in his concurrence, "... there must be a weighing of the degree of infringement of the individual's liberty interest against the need for regulation." (p. 249) (in the context of the Fourteenth Amendment).

The Fifth Circuit gave great deference to the "special factors" of employment so as to bar a *Bivens*-type claim against the director of a federal space flight center. *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981) on remand from this Court, 446 U.S. 914. Thus, the need to permit the Sheriff to exercise his employment authority should take into consideration the special factors in this case.

Given the special status of law enforcement agencies, because of the crucial state interests at stake, let us turn now to the heart of the matter by examining the exercise of authority granted by Article 6869 against a challenge of "political patronage" inspired personnel actions.

2. *Political Patronage Cases*

Accepting for the moment the jury's verdict that certain members of the class were transferred, demoted, and discharged upon political affiliation considerations, it is the position of Sheriff Thomas that such was proper, lawful, and consistent with the Federal Constitution, because of the need for personal confidence, loyalty, and trust in the deputies he employed.

Our inquiry could have no better starting point than a suit involving deputy sheriffs raising this very issue which was decided by this Court. Nor could there be a better ending point than a recent holding by the Fifth Circuit involving the role of the State's interests incident to the discharge of a County government employee who was deemed to be a non-policy-making but confidential status and thus failed to state a cause of action for a political patronage discharge from employment.

The U.S. Supreme Court case is that of *Elrod v. Burns*, 427 U.S. 347 (1976) where a five to three majority of the Court concluded that, under a strict scrutiny standard of review, the State interests proffered in support of the *wholesale* discharge of half of the 3,000 employees of the Cook County, Illinois Sheriff's Office violated the First and Fourteenth Amendments where the discharges were based on one's political affiliation. (Here, a mere handful were held by the trial court to be in this category.) The Court

rejected outright the Sheriff's argument that effective government (p. 364-367) and preservation of the democratic process (p. 368-371) were proper to justify patronage dismissals. As to the third interest, however, the Court was clear to create an area where patronage dismissals would be tolerated. It is submitted that the instant case falls within that area: confidence and loyalty.

The *Elrod* decision most definitely left open for consideration the "gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights..." (at 362). Applying that test to the acts of Sheriff Thomas, it is readily apparent that he did *not* initiate wholesale firing when he took office. Rather, he evaluated the personnel in his office and, as to those in whom he had *confidence* and expressed *personal loyalty* (pp. 367 and 372), he decided who was to perform which tasks. It must be recalled that a deputy sheriff in Texas may financially bind the Sheriff to acts of the deputy, as noted earlier. This factor was *wholly absent* in *Elrod.*

The lower federal courts continue to uphold dismissal of government employees who are terminated based on either political considerations [*McCormick v. Edwards*, supra and *Hoopes v. Nacrelli*, 512 F.Supp. 363 (E.D. Pa. 1981)], or the adverse impact on the effectiveness of the working relationship between the supervisor and employee [*Herrington v. Mississippi Regional Med. Center*, supra].

The Sheriff in *Elrod* claimed that party loyalty of his employees was needed and that dismissal was therefore warranted. The opinion by Justice Brennan (joined by J. White and J. Marshall) upheld such dismissals where limited to those in a policy-making position. Justice Stewart (joined by J. Blackmun) concurred in the judgment in a

short separate opinion by observing that the sole question presented was "whether a nonpolicy-making, non-confidential employee can be dismissed or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." (p. 375)

Justice Powell, much like Justice Stokes in *Murray v. Harris*, supra, noted that those who take a job on a patronage basis "may not be heard to challenge it when it comes their turn to be replaced" (p. 380, quoting from the Supreme Court of Pennsylvania in *American Federation of State Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971)].

The Fifth Circuit in *Stegmaier v. Trammell*, 597 F.2d 1027, decided in 1980, upheld the discharge of a deputy circuit clerk based on her failure to support the recently elected Circuit Clerk in the 1976 election in Cherokee County, Alabama. Circuit Judge Simpson surveyed the statutory grounds of authority and concluded that the dismissal was proper under the guidance of *Elrod* because Ms. Stegmaier was a confidential County employee. The theme of the confidential employee will be treated in paragraph D, below.

The second main case is last year's decision in *Branti v. Finkel, supra*. The nature of the duties performed (practice of law) and the nexus with the elected official (none) were deemed critical in holding that the politically based firings by the Rockland County (N.Y.) Public Defender violated the First Amendment rights of his two assistants. Here, the deputies performed a vital government role (law enforcement) which could result in pecuniary liability for the Sheriff. Thus, the nature and nexus prongs of *Branti* demonstrate that the Sheriff acted properly in regards to his challenged actions.

3. *Reasonable Conditions of Employment*

The last area of constitutional challenge by governmental employees deals with certain conditions of employment which are said to infringe First Amendment rights. Thus far, we have seen that the courts of Texas and Pennsylvania give no succor to such petitions because the risk of losing the job was present at the outset and thus voluntarily assumed by the employee. To the same end are (a) the Fourth Circuit's decision in *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (1979) where a North Carolina statute was held to give the teacher advance notice of what conduct might result in dismissal, (b) the Fifth Circuit's opinion in *Carson v. Russell*, 602 F. 2d 714 (1979), involving an assistant state attorney in Florida who took the position subject to a condition which the court held was applicable, (c) *Hopkins v. Dolinger*, 454 F.Supp. 59 (W.D. Va. 1978) where it was held proper for the Sheriff of Smyth County to fire a deputy who took the job "at will." (at p. 63), and (d) *Endicott v. Huddleston*, 644 F.2d 1208 (7th Cir. 1980) where no Due Process violation was found when the incumbent came to the end of his four-year appointment and was not reappointed as county assessment supervisor, although some political overtones were evident.

It is submitted that the waiver argument, which was rejected in both *Elrod*, supra, at 359, n.13, and *Branti*, supra, at 512, n.6, is well founded here when the situation is viewed in its *totality*. The Respondent and his class below made no such showing that they were unaware of the vagaries of their appointment as deputies. More importantly, the plaintiffs below performed a most critical function (law enforcement) and, therefore, must enjoy an extremely close personal relationship with the Sheriff, in light of that function. This Court in *Elrod* left open the door to explore a

case with "broader public responsibilities", such as a prosecuter (p. 519, n.13) Here is such a case, it is submitted. The footnote in *Elrod* reads as follows:

> "We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or *loyalty*." (citation omitted) (emphasis added).

It is also noted that a number of federal employees are exempted from the competitive civil services and serve as confidential employees [5 USC Sections 3302 (exempt from examination) and 7501 (not subject to the procedural safeguards incident to adverse actions, such as demotions, transfers, or discharges)].

D. *Stegmaier and Barrett: Personal Loyalty*

Sheriff Thomas also relies on *Stegmaier* as support for a ruling by this Court that the transfers, demotions, and discharges he directed were constitutionally permissible.

Citing Alabama law as to the authority of a deputy and the civil liability of the clerk for the deputy's errors, Fifth Circuit concluded in *Stegmaier*:

> "... the Circuit Clerk must be afforded the opportunity to select his single deputy clerk; he must be able to select a deputy in whom he has *total trust* and *confidence* and from whom he can expect, without question, *undivided loyalty*." (at p. 1040) (emphasis added)

By the same token, the sheriff's deputies of Dallas County are in the same legal posture as the deputy circuit clerk, though several times more numerous, because their gov-

ernmental function as law enforcement officers makes them each the functional equivalent of the "single" deputy clerk in *Stegmaier*.

The *Stegmaier* Court found support for the existence of two exceptions to the party patronage ban: both confidential employees as well as policymaking employees, in *Illinois State Employees v. Lewis*, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928, 943 (1973). The *Lewis* decision was written by then Circuit Judge Stevens and stressed that party loyalties, aside from politics, could justify political termination. Here, the Petitioner urges that he based his actions on *personal* loyalty, rather than *political* loyalty; hence, the personnel actions are clearly free from constitutional infirmity, it is submitted.

E. *Summary*

The personnel actions taken by the Petitioner in transferring, demoting, and discharging certain deputies in his office are fully sanctioned by the Texas Legislature, the courts of Texas, and, it is submitted, by the Federal courts, especially this Court's reservations in *Elrod* and *Branti* (dealing with personal loyalty).

In a nutshell, the class members *took* their jobs as deputies subject to the Texas law which represented the will of the electorate to allow the elected sheriff to employ deputies at his pleasure. They *lost* their jobs or positions because of a newly-elected sheriff, who had the employment competence under state law to select those as his alter ego in whom he had personal confidence and *loyalty*, aside from political affiliations.

Moreover, as those charged with the enforcement of the laws and with the statutory authority to bind the Sheriff

financially, the Respondent and his class stand in the relationship of confidential employees for purposes of justifying their transfer, demotion, or discharge under the employment system as recognized by *Elrod*, supra, and *Stegmaier*, supra.

The vital governmental function here, where prompt action is absolutely necessary to employ only those in whom the Sheriff has complete trust and confidence, does not admit to alternatives, such as discharge for cause, it is submitted, in this case. [As the concept of civil service for Texas Sheriffs' departments of the larger counties emerges and gains experience, the need for the critical elements of personal loyalty and prompt dismissals will decline of necessity.]

We urge that the actions by the Petitioner, taken under the existing law of Texas to ensure that he appointed those in whom he had confidence and trust, were entirely consistent with the Federal Constitution and the decisions of this Court.

III.

QUALIFIED IMMUNITY

THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY IS AVAILABLE TO THE PETITIONER IN THE EVENT IT IS DETERMINED THAT HE WAS SUED IN HIS INDIVIDUAL CAPACITY.

The Petitioner is in a real quandary on this issue. The Fifth Circuit held that the Petitioner and the County were jointly liable for the Section 1988 attorneys fees awarded to Respondent's counsel, but yet declined to permit the Petitioner to avail himself of his qualified immunity defense. That defense is of critical importance if the Petitioner

is held to have been sued in his individual capacity. The Petitioner takes the position that he is not financially responsible for any economic consequence of this action where he was acting in his official capacity and pursuant to state law, and in the absence of bad faith. The trial court expressly declined to rule on this issue of capacity and the appellate court declined to remand the case, so as to permit the Petitioner to avail himself of this defense.

A. Petitioner Followed Fifth Circuit Precedent to His Detriment

As provided by *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979), which represented the settled law in the Fifth Circuit, deputy Barrett and the class failed to discharge their burden to pierce the Sheriff's qualified immunity by pleading and proving an abuse of his authority. While this case was on appeal, this Court decided *Gomez v. Toledo*, 446 U.S. 635 (1980), holding that qualified immunity is an affirmative defense to be asserted by the defense.

The circuit court's decision (App. A) noted the *Gomez* decision, but because there was no record on which to base a review, it declined to grant Sheriff Thomas the benefit of the change wrought by *Gomez*. The Petitioner has thus been deprived not only of avoiding liability imposed on him by the court of appeals — jointly with Dallas County — but also has been denied the opportunity to assert a defense which was not his to assert at the time of trial under existing Fifth Circuit precedent. Surely there must be relief from this "Catch-22" situation. *Brown v. Louisiana*, 447 U.S. 323 (1980) (retroactivity of Sixth Amendment entitlement granted to Petitioner whose case was pending on appeal at time of new rule).

B. Entitlement to Qualified Immunity is Clear

The purpose of the doctrine applicable to those in the executive branch of either the federal or state governments is to provide protection from liability for those who perform their official duties in a reasonable manner [*Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974)]. Similar considerations underlie the judicial [*Stump v. Sparkman*, 435 U.S. 249 (1978)] and legislative [*Hutchinson v. Proxmire*, 443 U.S. 111 (1979)] immunity doctrines.

The executive immunity urged here is the qualified immunity doctrine, as announced by this Court in *Wood v. Strickland*, 420 U.S. 308 (1975) which established a two-prong test as a predicate for invoking the protection, namely:

1. Objective test — whether the conduct contravenes settled law, and

2. Subjective test — whether the official was acting in a sincere belief that what he is doing is right and correct.

Application of the *Wood* standard to the instant petition shows that the Sheriff satisfied both tests noted above. Objectively, no known court case had ever held that a Texas Sheriff could not discharge his deputies at his pleasure, as provided by the state legislature. Subjectively, the Sheriff based his transfers, demotions, and discharges on his belief that he had the statutory authority to do so. (Tr. 68-87, 108-111). A summary of Mississippi law on immunity for the officials at the Parchman penitentiary is found in *Bogard v. Cook*, 586 F.2d 399, 410-415 (5th Cir. 1978), involving a Section 1983 suit by prisoners for damages; qualified immunity held to apply; and no malice was found where state law authorized certain procedures which were followed by the officials). The same defense will be asserted

by the Sheriff in the event he is held to have been sued in his individual capacity.

Sheriff Thomas, acting in his official capacity, considered his conduct in question as proper under Texas law. There was no law to the contrary and he could not reasonably have known of any obligation to act in a contrary manner [*Chagnon v. Bell*, 468 F.Supp. 927 (D. D.C. 1979) (wiretap case where qualified immunity upheld where law was unsettled)]. The recent decision by the Fifth Circuit in *White v. Thomas*, supra, confirms this very point. Thus, he is entitled to qualified immunity protection. The failure of the courts below to consider this point was error, which should result in reversal of the relief granted to the Respondent and the class, insofar as the Petitioner's new found liability at the court of appeals level is concerned.

C. Summary

The Petitioner left the trial arena with the lingering question as to whether he could be held liable in his official or individual capacity, a question which the District Judge specifically declined to resolve. App. C, page 5. Ascending the appellate ladder, the Court of Appeals for the Fifth Circuit declined to resolve the official-individual capacity issue, but it did split the attorneys fees award 50-50 as between the County and Sheriff Thomas.

Three possible avenues are now open:

(A) the Sheriff is regarded as having been sued in his *official* capacity, in which event —

(1) qualified immunity is not available to him anyway and

(2) the County or State of Texas is responsible fully for the award [*Familias Unidas v. Briscoe*, 610 F.2d 391 (5th Cir. 1980)], or

(B) the Sheriff is deemed to have been sued solely in his *individual* capacity, thus making remand, in order to assert his entitlement to qualified immunity, absolutely essential and the imposition of fees unjust, or

(C) the Sheriff is to be held to have been sued in *both* his individual *and* his official capacity in which case attorneys fees award against the Petitioner, under these circumstances, would be greatly unjust. Section 1988.

The Petitioner maintains that he was sued solely in his official capacity. The trial court declined to take a stand either way. The court of appeals seemed, however, to regard the suit in *both* capacities. In declining to waive the "wand" of characterization, it decided instead to use a "crude ax of apportionment" of costs by dividing the attorneys fees award evenly between the Sheriff and the County of Dallas. That disposition fails to lay the issue to rest, however; it merely cries out louder for a definitive judicial determination.

This case stands in much the same "who pays the bill" posture as in *University of Texas v. Camenisch*, U.S. , 68 L.Ed.2d 175 (1981). There, this Court remanded that issue for trial on the merits.

CONCLUSION

This Petition is an excellent candidate for the granting of the Petition for Writ of Certiorari, it is respectfully submitted, for three reasons. First, the novel question of Eleventh Amendment immunity for a Texas Sheriff as a state officer has recently burst forth upon the horizon of the Fifth Circuit. As the practical concerns of governmental financing face increasing demands with decreased sources of income and the basic functions of government remain challenged by the seemingly never ending stream of Section 1983 litigation, this immunity issue represents national importance and deserves a thorough evaluation prior to bringing down the curtain of appellate review in this case.

Second, the Sheriff violated none of the Respondent's First Amendment rights by virtue of his personnel actions which were based, in part, on needs of personal loyalty to assist him in the discharge of his law enforcement role and where he could be held financially liable for the acts of his deputies (a feature wholly absent in *Elrod*). Moreover, the decision below conflicts with well-settled state law. Lastly, the vexing issue as to the Petitioner's entitlement to qualified immunity has been made less clear at each level in the federal judiciary travelled to date. The treatment of this defense has been, in effect, to deny the Sheriff such entitlement, in derogation of this Court's teachings. Thus, the awarding of attorneys fees works a grave injustice to the Petitioner, in violation of Section 1988 of Title 42.

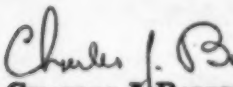
The instant Petition would provide this Court with an opportunity to review matters of grave national importance in this evolving and uncertain area of civil rights liability of state officers in the three specific contexts treated herein.

The importance of the several questions of federal law warrants this Court's resolution, it is urged.

The Petitioner asks the Court to sound a certain trumpet which would be heard over the roar of the litigative battlegrounds so as to guide the lower courts and litigants.

Respectfully submitted,

HENRY WADE
DISTRICT ATTORNEY



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ATTORNEYS FOR PETITIONER,
SHERIFF THOMAS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition has been provided by U.S. Mail, postage prepaid, pursuant to Rule 28, United States Supreme Court Rules, to:

Addressee	*Representing*
1. Mr. James C. Barber Attorney at Law 318 Merchants State Bank Bldg. 5217 Ross Avenue Dallas, TX 75201	Respondent and Class
2. Mr. Earl Luna 2416 LTV Building 1525 Elm Street Dallas, TX 75201	County of Dallas, et al (Intervenors)
3. Mr. Sam Clontis Executive Director Texas Association of Counties P.O. Box 2131 Austin, TX 78768	Texas Association of Counties (Amicus Curiae in Court of Appeals)

on this 25th day of November 1981.

Charles J. Baldree

CHARLES J. BALDREE

Appendix

BENNY B. BARRETT, Plaintiff-Appellee
Cross-Appellant,

v.

CARL THOMAS, Sheriff, Defendant-Appellant Cross-Appellee.

No. 79-3021.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 10, 1981.

Appeal was taken from a decision of the United States District Court for the Northern District of Texas, Robert W. Porter, J., which, inter alia, held unconstitutional certain personnel regulations of the sheriff's office of Dallas County, Texas, and which found that sheriff was liable to certain former deputies who were demoted or fired for their political affiliations. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad; (2) prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office; (3) Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations; and (4) attorney fees under Civil Rights Attorney's Fees Awards Act could run against Texas county trea-

sury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application.

Affirmed in part; vacated in part; reversed and rendered in part.

Brown, Circuit Judge, filed concurring opinion.

1. Constitutional Law — 90.1(1)

Sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad. U.S.C.A.Const. Amend. 1.

2. Constitutional Law — 90.1(1)

Prohibitions on "conduct subversive of the good order of discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office. U.S.C.A. Const. Amend. 1.

3. Constitutional Law — 90.1(1)

Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and department morale, provided that those interests outweigh employee's interests in commenting on matters of public concern; however, in an effort to limit offensive speech, public employer may not employ a prophylactic approach that prohibits constitutionally protected expression. U.S.C.A. Const. Amend. 1.

4. Constitutional Law — 90(1)

Overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. U.S.C.A.Const. Amend. 1.

5. Constitutional Law — 90.1(1), 91
Sheriffs and Constables — 21

Sheriffs, like other elected county officials in Texas, have wide-ranging discretion in selection of their employees and therefore deputy sheriffs have no legal entitlement to their jobs as public employees and may be fired for many reasons or for no articulable reason at all; however, sheriff may not condition continuation of public employment on an employee's relinquishment of First Amendment liberties of political belief and association. U.S.C.A.Const. Amend. 1.

6. Sheriffs and Constables — 21

Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations. U.S.C.A. Const. Amend. 1; Vernon's Ann.Tex.Civ.St. art. 6869.

7. Civil Rights — 13.10, 13.13(1)

Qualified immunity is an affirmative defense to a section 1983 action and burden of pleading and proving it rests with defendant. 42 U.S.C.A. § 1983.

8. Federal Courts — 616

Sheriff, who was named defendant in section 1983 suit challenging certain personnel actions, was not entitled to claim defense of qualified immunity, which was raised for first time on appeal. 42 U.S.C.A. § 1983.

9. Civil Rights — 13.17

Although various class members did not prevail on every aspect of relief sought in section 1983 suit challenging disputed personnel actions taken by sheriff and constitutionality of certain personnel regulations of sheriff's office, favorable disposition of their claim for injunction against departmental conduct rules entitled them to recover attorney fees. 42 U.S.C.A. §§ 1983, 1988.

10. Civil Rights — 13.17

Attorneys fees under Civil Rights Attorney's Fees Awards Act could run against Texas county treasury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application. 42 U.S.C.A. §§ 1983, 1988; Fed. Rules Civ. Proc. Rule 24, 28 U.S.C.A.

Henry M. Wade, Criminal Dist. Atty., Charles J. Baldree, Asst. Dist. Atty., Dallas County Texas, Dallas, Sue L. Lagarde, Asst. Dist. Atty., Dallas, Tex., for defendant-appellant, cross-appellee.

James C. Barber, Steven B. Thorpe, Dallas, Tex., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, THORNBERRY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal, argued and decided in tandem with *Collins v. Thomas*, 649 F.2d 1203 (5th Cir. 1981), arises from dis-

puted personnel actions taken by Carl Thomas during his tenure as Sheriff of Dallas County, Texas. It addresses the constitutionality of certain rules regulating the conduct of employees in the Dallas County Sheriffs' Office, the merits of 42 U.S.C. § 1983 claims brought by former deputy sheriffs alleging that they were demoted or fired by Thomas for their political affiliations, and Dallas County's liability for a 42 U.S.C. § 1988 attorney's fees award against Sheriff Thomas. We vacate the district court's injunction against § 15 of the Sheriff's Office Code of Conduct; we believe § 15 is facially unobjectionable and constitutional as applied here. We reverse the district court's determination that Dallas County is not liable for the § 1988 award against Thomas and render judgment holding the County jointly and severally liable with the Sheriff for the attorneys' fees award. We affirm the district court's disposition of the remaining issues presented on appeal.

I. The Facts

Benny Bob Barrett joined the Dallas County Sheriff's Office ("the department") as a patrolman in May 1966. Barrett had compiled a solid work record and advanced to the position of sergeant in the Criminal Investigation Division when Republican Carl Thomas defeated Clarence Jones, the Democratic incumbent, in the November 1976 election. After taking office, Thomas transferred Barrett, a Jones supporter, laterally to the Civil Warrants Division in March 1977. Later, in August of the same year, he was demoted to the position of detention officer.

Peeved by his demotion, which entailed reductions in pay, benefits, and prestige, Barrett told a newspaper reporter on August 20 that Thomas was a "paranoid" person with a "Hitler mentality". These remarks were quoted verbatim

in a newspaper story published the same day. On August 22, Barrett went before a public meeting of the Dallas County Commissioners' Court to criticize Thomas for conducting a political purge in the Sheriff's Office. On August 23, Thomas fired Barrett. The discharge notice stated that Barrett's published remarks violated Dallas County Sheriff's Office Code of Conduct §§ 12 & 15.[1]

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1. § 12 provides: Gossip and Confidential Information

Gossiping about affairs of the department or the members of it, making unauthorized public statements, or the unauthorized revealing of confidential information of any kind, is prohibited.

a. No member of the department shall make known any information concerning the progress of an investigation, a known or reported law violation, or condition against which action is to be taken, at a future time, or any proposed Sheriff operation of any type, to any person not authorized to receive it.

b. It is expressly forbidden to give any lawyer, bondsman, or the agent of either, or any other person unauthorized information regarding prisoners in confinement.

§ 15 provides: Willful Disobedience or Insubordination

No member of the department, to whom a lawful order is addressed by a supervisory officer, shall willfully disobey that order, and no conduct subversive of the good order or discipline of the department will be tolerated.

Continuous or willful violations of this Code of Conduct are punishable under this rule.

a. no deputy shall use abusive, insulting, or indecent language to a supervisory officer.

Within a week of Barrett's firing, the Sheriff issued General Rules "to clarify," Thomas testified, the conduct proscribed by §§ 12 & 15. Thomas conceded on direct examination that, although these Rules were not in writing at the time Barrett was discharged, he considered them to be effective and enforceable against Barrett. Record, vol. III, at 95. Rules 1 and 2 provide:

1. No employee of this department will address any statement or remark to any member of the news media that is or could be of a controversial nature. All requests will be referred to the Sheriff even during my absence.

2. No member of this department will discuss any matters pertaining to policy or procedure of this department with any elected official or department head.

Barrett brought this § 1983 class action on behalf of all sheriff's office employees who had been demoted or fired by Sheriff Thomas for supporting Sheriff Jones in the 1976 election. His original complaint alleged that, in firing or demoting employees who did not support him in the 1976 election, Thomas abridged first amendment speech and associational rights. The complaint also challenged the constitutionality of personnel regulations governing public statements by Sheriff's Office employees, see n. 1, *supra*, on grounds of vagueness, overbreadth, and as impermissible prior restraints on protected speech.[2]

After issuing a preliminary injunction against enforcement of the challenged personnel regulations and certifying the plaintiff class, the trial judge presided over a jury trial on the merits in January 1979. In response to a series of interrogatories, the jury found that political considerations had motivated Thomas to transfer, demote, or discharge various plaintiff class members.[3] The jury determined that

2. The complaint also joined a pendant state law claim for defamation based on a press release issued by Thomas indicating that Barrett had been fired for being a "lazy individual." After prolonged deliberation, the jury was unable to reach a verdict on Barrett's defamation claim. The trial court then dismissed the pendant claim without prejudice.

3. Although Thomas failed to raise the objection at trial, he asserts on appeal that the trial court incorrectly worded the jury interrogatory asking whether the plaintiffs were wrongfully transferred, demoted, or discharged for exercising their constitutionally protected rights of speech and political association. Specifically, Thomas contends that the charge was defective because it inquired of the jury whether the plaintiffs' political affiliations and activities were "motivating factors" in their transfers, demotions, or discharges. The court advised the jury that the plaintiffs bore the burden of proof on this question. The Sheriff insists that a proper formulation of the question would have made clear that plaintiffs must prove that their constitutionally protected activities were either the "primary" or the "sole" cause of their firings or demotions.

political considerations were a motivating factor in Barrett's transfer and demotion, but that Thomas did not discharge Barrett for political reasons. The jury was instructed that the scope of law enforcement officers' free speech rights is circumscribed by a balancing test weighing the public interest in regulating such speech against the speaker's private interest in making the comments. Based on this instruction and the Sheriff's concession that Barrett was fired for calling Thomas a "paranoid" person with a "Hitler mentality," the jury determined that Barrett's criticism of Thomas was not protected speech.

On the basis of these jury findings, the district court struck down each of the challenged personnel regulations for vagueness and overbreadth. The court permanently en-

These contentions are devoid of legal merit. In addition to the inquiry whether political considerations were "motivating factors" in the challenged personnel actions, the court submitted for the jury's consideration this question:

> Do you find from a preponderance of the evidence that the defendant would have reached the same decision as to the class members' transfer, demotion or discharge absent consideration of the class members' political party affiliation, the failure to support the defendant, or the support of the defendant's opponent in the political campaign? (Burden of proof on defendant)

In its special verdict, the jury answered "no" to this question. As a matter of law, this formulation of the issue comports with the Supreme Court's holding regarding the nexus a public employee plaintiff must prove between his exercise of first amendment rights and an adverse personnel action. *Doyle v. Mt. Healthy City Board of Education*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977) (plaintiff must prove that protected activities were a "substantial factor" in the decision to discharge).

In any event, Fed.R.Civ.P. 51 precludes our consideration of this issue at the threshold. The Sheriff waived any error in the jury instructions by this failure to object at trial.

joined further enforcement of the regulations and decreed that certain members of the plaintiff class who were fired or demoted for their political affiliations were entitled to reinstatement with back pay. The trial judge accepted the jury's verdict that Thomas had not fired Barrett for his political associations and that Barrett's remarks to the press were constitutionally unprotected.[4]

While the court found that Barrett was entitled to back pay compensating for his politically-inspired demotion, it denied him reinstatement to his former position. Attorney's fees were awarded to the prevailing plaintiffs. An April date was set for a hearing to fix the amounts of back pay and interest due each individual member of the plaintiff class and to review the attorney's fee request filed by the plaintiffs' attorney.

One week before the scheduled April hearing — more than three months after the jury trial — Dallas County moved to intervene. The County argued that an adjudication of Thomas' liability in its absence would impair its interest in protecting the County treasury against the plaintiffs' claims. The plaintiffs opposed Dallas County's intervention, contending that the County's motion was untimely, that the County's expressed disclaimer of liability for the sheriff's personnel decisions negated its assertion of an interest in the outcome of the April hearing, and that the County interests were inadequately represented by the county district attorney's representation of the sheriff, who shared the County's interest in minimizing liability to the plaintiffs. Stressing that County intervention would pose the

4. The trial judge determined, notwithstanding the jury verdict, that Barrett's comments to the County Commissioners were protected. This finding did not obviate, however, the justification for Barrett's discharge upon his statements to the press.

threat of a prejudicial delay at a time when the lawsuit was nearly resolved, the district court denied the motion to intervene.[5]

The district court then proceeded with the scheduled April hearing. In a judgment specifying the terms of relief granted to the members of the plaintiff class, the court, on May 20, ordered reinstatement of nine demoted or discharged employees and fixed the amounts of back pay and interest due fourteen members of the plaintiff class. The court fixed the plaintiffs' attorney fee award at $34,015, but specified that the judgment "is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." Subsequently, in August, Judge Porter decided that the attorney's fees award would not lie against County funds, apparently because the plaintiff had affirmatively opposed the County's attempt to intervene prior to the April hearing.

On this appeal, the Dallas County District Attorney contends, *inter alia*,[6] that, (1) the personnel regulations enjoined by the district court are constitutional; (2) the

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5. The County brought an interlocutory appeal from this decision. This Court affirmed the district court's denial of the County's intervention motion without a published opinion under F.R.A.P. 34(a) and 5th Cir. R. 18. The Supreme Court denied the County's petition for a writ of certiorari. *Weber v. Barrett*, ... U.S. ....., 101 S.Ct. 1729, 68 L.Ed.2d 218 (1981).

6. Appellants raise questions going to aspects of the relief granted to plaintiff class members. Masters, Smith, Lowther, and Baker. They also insist that the district court erred in finding, notwithstanding the jury's verdict, that Barrett's comments to the County Commissioners' Court were constitutionally protected speech. Upon review of the record and the trial judge's lucid memorandum opinion, we find these contentions meritless and summarily affirm the district court.

sheriff's personnel actions were permissible; (3) the Sheriff is immune from this lawsuit; and (4) the attorney's fees award was improper because the plaintiffs did not "prevail" as required by 42 U.S.C. § 1988. The plaintiffs cross-appeal the trial court's determination that Dallas County is not liable for the attorney's fees award.

II. The Challenged Personnel Regulations

[1] The district court struck down each of the four Sheriff's Office personnel rules, *see* n.1 *supra*, challenged by the plaintiffs for overbreadth and vagueness.[7] Of course, either vagueness or overbreadth standing alone would present a fatal defect in the regulations. While the district court may well have been correct in concluding that three of the challenged regulations are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1925), we do not reach that question with respect to § 12 of the Sheriff's Office Code of Conduct or General Rules 1 and 2. We affirm the judgment below invalidating these regulations on the premise that these three "sweep unnecessarily broadly and thereby invade the area of protected freedom." *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed2d 325 (1964).

[2] Section 15, however, is a different story. We find the prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer"

7. The district court declined to reach plaintiffs' claim that the regulations also imposed constitutionality impermissible prior restraints. The issue is not before us on appeal.

facially constitutional in the context of rules regulating police department conduct. *Cf. Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), *cert. denied*, 430 U.S. 931, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977) (upholding police officer's discharge for breach of regulation forbidding conduct "which tends to subvert the good order, efficiency, or discipline" of the police department). While we can envision circumstances in which § 15 would be unconstitutionally vague or overbroad as applied,[8] this case does not present that problem. We are reluctant to circumscribe narrowly the sheriff's discretion in promoting the legitimate ends of "discipline, esprit de corps, and uniformity" among his law enforcement officers. *Kelley v. Johnson*, 425 U.S. 238, 246, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976).[9] Therefore, we reverse that portion of the district court's judgment holding § 15 unconstitutional and vacate the provision of its permanent injunction barring enforcement of § 15.

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8. *E. g., Bence v. Breier*, 501 F.2d 1185, 1193 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821 (1975) (police department regulation prohibiting "conduct unbecoming a member and detrimental to the service" unconstitutionally vague as applied to police officers who wrote a letter to a labor negotiator regarding terms of their employment).

   Had Barrett been dismissed for his appearance before the County Commissioners on the basis of § 15 alone, we would have no hesitation in declaring the admittedly elastic language of the regulation unconstitutionally overboard as applied. Similarly, the prohibition of acts subversive of good order might well be stretched to proscribe conduct in a manner that would render the regulation unconstitutionally vague as applied. In this case, however, Barrett's termination cited conduct (i.e. his remarks to the press) to which § 15 can properly be applied.

9. We are not equating the peculiar milieu of a law enforcement agency to military service. *Kannisto v. City and County of San Francisco*, 541 F.2d at 843. The Supreme Court has firmly held that police officers enjoy the full complement of First Amendment protections. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87

[3] The First Amendment freedoms infringed by the other challenged regulations are not absolute. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and departmental morale, provided that these interests outweigh the employee's interests in commenting on matters of public concern. *Id.* Yet, in an effort to limit offensive speech, the public employer may not employ a prophylactic approach that prohibits constitutionally protected expression. *See Grayned v. City of Rockford*, 408 U.S. 104, 114-19, 92 S.Ct. 2294, 2302-05, 33 L.Ed.2d 222 (1972). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963).

[4] The overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. Parts of Section 12 and General Rules

S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). The public employer's interest in regulating the speech of police officers does not rise to the level of the government's interest in regulating the conduct of military personnel. See *Brown v. Glines*, 444 U.S. 348, 354, 100 S.Ct. 594, 599, 62 L.Ed.2d 540 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Davis v. Williams*, 617 F.2d 1100, 1104 (5th Cir. 1980) (en banc), *cert. denied*, ...U.S....., 101 S.Ct. 336, 66 L.Ed.2d 160 (1980) ("[W]e are loathe to equate a municipal fireman with a paratrooper or even with such a quasi-soldier as the recalcitrant officer-dermatologist Levy.").

1 and 2 collide with this barrier. Section 12 flatly prohibits "unauthorized public statements." General Rule 1 denies department employees their right to speak to reporters on any topic "that is or could be of a controversial nature." General Rule 2 forbids discussions of Sheriff's Office policy or procedure with "any elected official." Section 12 and Rules 1 and 2 are facially overbroad. They explicitly forbid acts that departmental employees have a clear constitutional right to do. Although promoting loyalty, discipline, and efficiency in the department is a legitimate goal, these rules sweep beyond their intended ambit and impermissibly chill protected speech by the department's employees.

III. Excutive Discretion and Patronage Dismissals

The trial judge instructed the jury that Barrett and the plaintiff class bore the burden of proof in establishing that Sheriff Thomas' personnel actions were politically motivated patronage firings. The jury found that plaintiffs had carried their burden. Yet, Thomas insists that the broad discretion vested in Texas county sheriffs by Tex.Rev.Civ.Stat.Ann. art. 6869 (Vernon 1960) authorizes his conduct. Under art. 6869, deputies serve "at the pleasure" of the sheriff.

[5, 6] Sheriffs, like other elected county officials in Texas, have indisputably wide-ranging discretion in the selection of their employees. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). It follows that deputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all. Nevertheless, there are overriding limits on the sheriff's discretion in employment matters. He may not condition continuation of public employment on an employee's relinquishment of the First Amendment liber-

ties of political belief and association. *Perry v. Sinderman*, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972). The establishment of a political orthodoxy among public employees by an executive official is constitutionally impermissible.

The facts and legal claims presented in this case are strikingly similar to those confronted by the Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Republican non-civil-service employees of the Cook County, Illinois, Sheriff's Office who had been swept out of their jobs in the wave of political patronage hirings and firings following the replacement of the incumbent Republican sheriff with a Democrat sued Sheriff Elrod for depriving them of their constitutionally protected rights to affiliate with a political party of their choice. Five members of the Supreme Court joined in holding these patronage firings unconstitutional deprivations of political liberty.

The plurality opinion noted that political patronage dismissals restrict the individual liberties of belief and association at the core of the First Amendment. While these rights are not absolute, they may not be trenched upon absent a showing that the liberty-restraining patronage system furthers "some vital government end by a means that is least restrictive of freedom of belief and association. . . ." *Id.* at 363, 96 S.Ct. at 2685. Sheriff Thomas has not pointed to a vital governmental interest served by making his deputies toe the prescribed political line. He has likewise not shown that such line-toeing is the least restrictive means of achieving a legitimate objective.

This Court recently addressed § 1983 claims regarding political patronage firings emanating from the Lake County, Florida, Sheriff's Office. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980). In holding that the *Tanner* plaintiffs had

failed to meet the burden of making a prima facie showing that Sheriff McCall's personnel decisions were motivated by political animus, the Court set out a legal blueprint for applying *Elrod v. Burns* principles to § 1983 claims alleging political patronage dismissals. *Tanner* contemplates a three-step inquiry on review. First, have the plaintiffs alleged conduct that, if proven, would constitute an infringement of their constitutional rights? Second, have the plaintiffs made a prima facie showing that impermissible political animus, motivated the challenged personnel decisions? Finally, have the defendants rebutted such a showing with sufficient evidence of nonpolitical motives for the challenged conduct?

The pleadings filed by Barrett and the plaintiff class properly put in issue the constitutional claim. The trial record amply supports the jury's finding that the constitutionally protected political activities or associations of Barrett and the plaintiff class were motivating factors in Sheriff Thomas' personnel decisions. On these facts, the plaintiffs have met their burden of pleading and proving a deprivation of constitutional rights motivated by political animus. Sheriff Thomas, on the other hand, has failed to rebut this showing to the jury's satisfaction with evidence "that the same employment decisions would have been reached regardless of the constitutionally protected conduct." *Tanner v. McCall*, 625 F.2d at 1190. Therefore, affirmance of the jury's verdict is warranted.

Nevertheless, the Sheriff insists that his deputies are not entitled to the usual degree of protection from the changing tides of political fortune. Sheriff Thomas maintains that his deputies are confidential, policymaking employees within the exceptional class of public servants of whom political allegiance may be demanded. *See Elrod v. Burns*, 427 U.S.

at 364-68, 96 S.Ct. at 2685-87; *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979).

The Supreme Court recently refined the process of identifying those employees to whom the policymaker classification should be applied. *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In dismissing the labels "confidential" and "policymaker" as irrelevant, the Court declared, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295. The terms "confidential" and "policymaker" illuminate the contours of the employee class that may permissibly be subjected to a political litmus test, but any specific application of the exception must turn on the importance of political loyalty to the execution of the employee's duties.

The job duties of the plaintiff class range from clerical work to law enforcement. They are precisely the same duties performed by the plaintiffs in *Elrod v. Burns*, where the confidential and policymaking exception was deemed not to apply. Sheriff Thomas offers no satisfying justification for demanding greater political loyalty from his deputies than Sheriff Elrod was entitled to expect from his employees. In a sheriff's department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship. The rule of *Elrod v. Burns*, not the exception, applies here.

IV. Immunity

Falling back to his next line of defense, Sheriff Thomas seeks "the Court's indulgence" in raising — for the first time on appeal—the defense of qualified official immunity. The

Sheriff, as an executive official of Dallas County, is entitled to claim immunity from suits over good faith acts performed in furtherance of his governmental duties. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[7,8] Qualified immunity, however, is an affirmative defense; the burden of pleading and proving it rests with the defendant. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 (1980). Sheriff Thomas' failure to interpose the immunity defense until this appeal leaves this court with no record to review on the question at the core of this defense: were Sheriff Thomas' actions based on a reasonable belief that the demotions, transfers, and dismissals were lawful? The court below did not explore this issue of fact and law — it was not raised. Powers of mystical insight, not mere "indulgence," would be necessary for us to accommodate the sheriff's request that we consider his belated immunity claim for the first time on appeal. We properly refrain from this suggested adventure in mysticism. It comes after the opportunity to litigate the issue has ended.

V. Attorney's Fees

Finally, we turn to the parties' conflicting contentions on whether the district court should have awarded attorney's fees to plaintiffs' counsel under 42 U.S.C. § 1988, and, assuming the award was proper, whether it may be recovered from the county treasury.

[9] Sheriff Thomas, clinging to the defenses we have found to be meritless, maintains that the plaintiffs are not "prevailing parties" within the meaning of § 1988. Although various members of the plaintiff class, including Barrett, did not prevail on every aspect of the relief sought, the favorable disposition of their claim for an injunction against the de-

partmental conduct rules, discussed in Part II, *supra*, entitles the plaintiffs to recover attorney's fees under § 1988. *Coen v. Harrison County School Board*, 638 F.2d 24, 26 (5th Cir. 1981) (per curiam). The district court's decision to award attorney's fees to plaintiffs' counsel merits our affirmance. The amount awarded is not in issue.

[10] The question remains whether the attorney's fees award lies against Dallas County. Sheriff Thomas possessed complete authority to hire and fire the plaintiff class members under art. 6869. Under this Texas law, his "acts or edicts may fairly be said to represent official [County] policy." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). It is now settled law that a § 1988 attorney's fees award may run against a public treasury for § 1983 violations by public officers acting in thier official capacities even though the public entity is not named as a defendant in the suit. *Hutto v. Finney*, 437 U.S. 678, 699, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522 (1978).

The issue presented here is whether deviation from the *Hutto v. Finney* rule is warranted when Dallas County, whose treasury is otherwise vulnerable to the fee award, was denied an opportunity to intervene in the late stages of this litigation in part because the plaintiffs opposed the County's intervention. The district court decided that plaintiffs could not satisfy thier attorney's fee award against the County treasury. While § 1988 vests discretion over a fee award in the trial court, the prevailing party is ordinarily entitled to recover a fee unless special circumstances render the award unjust. *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978). Finding no justification here for denying the prevailing plaintiffs their attorneys fees, we reverse

the district court's refusal to hold Dallas County jointly liable with Sheriff Thomas for the fee award.

Measured against the standards for timey Fed.R.Civ.P. 24 intervention established in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), Dallas County's motion to intervene was clearly tardy. This suit was pending for two years and had been tried on the merits before the County's motion was filed. Moreover, the County's interests were adequately represented at each stage of the proceedings by the county district attorney's representation of Sheriff Thomas. *Cf. Hutto v. Finney*, 437 U.S. at 699, 98 S.Ct. at 2578 (stressing that the State of Arkansas' interests had been represented throughout the litigation by the State Attorney General's representation of the Department of Corrections officials). The denial of the County's motion to intervene and the plaintiffs' opposition to the intervention do not render an award running against the County unjust under these circumstances.

Dallas County stands to suffer no more severe budgetary disruption than any public entity held liable under *Hutto v. Finney* for the § 1983 violations of its official policy-makers. Nothing the Supreme Court's observations on the inherent unfairness of awarding attorney's fees against the public officials individually without permitting the claim to run against the public entity, *Hutto v. Finney*, 437 U.S. at 699 n. 32, 98 S.Ct. at 2578 n. 32, we hold that the district court abused its discretion in refusing to enter judgment allowing the attorney's fees award to run against Dallas County. Therefore, we reverse and render judgment holding Dallas County jointly and severally liable for the § 1988 attorneys fees awarded plaintiffs' counsel in this action.

To summarize our holding, we affirm the judgment below in all but two respects. We vacate the portion of the trial

court's injunction invalidating § 15 of the Sheriff's Office Code of Conduct. We reverse and render judgment on Dallas County's liability for the § 1988 attorneys fees award to plaintiffs' counsel.

AFFIRMED IN PART; VACATED IN PART; REVERSED AND RENDERED IN PART.

JOHN R. BROWN, Circuit Judge, concurring:

I concur fully in sections I through IV of the Court's opinion, but specially concur in section V because bound by *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), repeated in *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980).[1]

My problem is that in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), finding county or municipal entities to be a "person" under § 1983, the Supreme Court confines this new-found liability to situations in which the action represents official policy, not just the unconstitutional act of an officer or agent of the entity.[2]

It seems incongruous to me that the Supreme Court meant to hold that Congress intended action to be that of the entity as a sort of "official" governmental policy when the

---

1. Vacated on grant of Rehearing En Banc now pending before the full Court.

2. The Court stated:

> We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the government as an entity is responsible under § 1983.

98 S.Ct. at 2038.

officer-agent is acting in a crass, flagrant violation of established constitutional rights. Especially is this true since, under *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), such an official (and hence the City, County entity) is denied the defense of good faith immunity when sued in an official capacity. See *Universal Amusement Co. v. Hofheinz*, 646 F.2d 996, 997 (5th Cir. 1981); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

The public treasury is made to bear the consequences of actions by an officer-agent no matter how flagrant or spectacular the unconstitutional conduct might have been on the theory that somehow such person is carrying out the official governmental policy of the entity.[3]

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3. Lurking also is the question of the Eleventh Amendment, which, for the present, I do not discuss.

U.S. Court of Appeals
FILED
Sep 1 1981
Gilbert F. Ganucheau
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

No. 79-3021

BENNY B. BARRETT,

Plaintiff-Appellee-
Cross Appellant,

vs.

CARL THOMAS, Sheriff,

Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC
(Opinion July 10, 1981, 5 Cir., 198 , F.2d).

(September 1, 1981)

ORDER:

No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

J. T. WILLIAMS
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE

U.S. District Court
Northern District of Texas
FILED
May 31 1979
Joseph McElroy, Jr.,
Clerk
By Pam Hill
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NO. CA3-77-1501-F

BENNY B. BARRETT,

vs.

CARL THOMAS, SHERIFF

JUDGMENT

The Court hereby enters the following judgment in this case:

(a) Section 12 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 12 of the Sheriff's Code of Conduct;

(b) Section 15 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 15 of the Sheriff's Code of Conduct;

(c) Sheriff Thomas's General Rule 1 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents

and successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 1;

(d) Sheriff Thomas's General Rule 2 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 2;

(e) Only 28 persons who filed claims with the court stating that they were individually entitled to a portion of any class relief granted by the court are potentially entitled to class relief in this case, and I enter judgment as follows on their claims:

(1) Bobby Don Baker is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,240.00 plus pre-judgment interest totaling $158.33, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(2) Benny Bob Barrett is entitled to back pay from August 23, 1977 to September 13, 1977 in the amount of $259.00 plus pre-judgment interest totaling $17.29, but he is not entitled to reinstatement, and his claim for defamation is dismissed without prejudice for lack of jurisdiction as a pendent state claim;

(3) Michael L. Berson is entitled to back pay from August 16, 1977 to May 31, 1978 in the amount of $1,890.00 and pre-judgment interest totaling $133.37;

(4) L. F. Chennault is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,794.00 and

pre-judgment interest in the amount of $17.22, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits with the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(5) James A. Cline is entitled to back pay from February 3, 1977 to December 31, 1978 in the amount of $4,682.00 and pre-judgment interest on that amount totaling $357.41;

(6) Jesse Gordon Earls is entitled to back pay from January 2, 1977 to February, 1978, in the amount of $2,284.00 and pre-judgment interest on that amount totaling $219.31;

(7) Gilbert F. Ellis, Jr., is entitled to back pay from May 16, 1977 to August 31, 1977 in the amount of $234.00 and pre-judgment interest totaling $24.14, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a civil investigator, and "front pay" from June 30, 1979 in the amount of the difference between the pay of a civil investigator and the pay of a jailer to the date of his reinstatement as a civil investigator;

(8) Jess L. Hays is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 and pre-judgment interest totaling $187.05, immediate reinstatement 30 days after entry of this judgment at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(9) Roy Lee Heard is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,622.00

plus pre-judgment interest totaling $183.74, immediate reinstatement 30 days after the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(10) Ray F. Masters is entitled to back pay from August, 1977 to June 30, 1979 in the amount of $31,268.00 plus pre-judgment interest totaling $1,134.15, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a lieutenant, and "front pay" at the rate of $1,615.00 per month from June 30, 1979 to the date of his reinstatement as a lieutenant;

(11) Walter Newell is entitled to back pay from January 1, 1977 to August, 1977, in the amount of $475.00 and pre-judgment interest on that amount totaling $41.88;

(12) Bobby J. Smith is entitled to back pay from January, 1977 to June 30, 1979 in the amount of $29,691.00 plus pre-judgment interest totaling $1,513.58, immediate reinstatement 30 days from the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $1,500.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(13) James W. Williams is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 plus pre-judgment interest in the amount of $187.05, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" in the

amount of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(14) Roger Lowther is entitled to immediate reinstatement 30 days from the entry of judgment in this case as a warrant sergeant with full pay and benefits, and "front pay" in the amount, if any, of the difference between the salary of a warrant sergeant and a sergeant in I.D., from June 30, 1979 to the date of his reinstatement as a warrant sergeant;

(15) Larry Gwinn is not entitled to any back pay, or reinstatement;

(16) Joseph Amos Bolt's class claim for relief is dismissed without prejudice;

(17) Jim H. Kitching is not entitled to back pay or reinstatement;

(18) Alvin Maddox, Jr., is not entitled to back pay or reinstatement;

(19) Jack Dunn is not entitled to any back pay or reinstatement;

(20) J. W. Finley is not entitled to any back pay or reinstatement;

(21) Marion J. Gregory is not entitled to any back pay or reinstatement;

(22) Nathaniel Harvey is not entitled to any back pay or reinstatement;

(23) Donald C. Higgins, Jr. is not entitled to any back pay or reinstatement;

(24) Judy A. Lollar is not entitled to any back pay or reinstatement;

(25) Bobbie J. Moore is not entitled to any back pay or reinstatement;

(26) Rosanna Rojo is not entitled to any back pay or reinstatement;

(27) Hector Sehwerert is not entitled to any back pay or reinstatement;

(28) Reggie L. Taylor is not entitled to any back pay or reinstatement;

(f) Plaintiffs' attorneys are entitled to recover $34,015.00 as attorney's fees in this case;

(g) All costs are hereby taxed against the Defendant;

(h) This judgment is entered against Carl Thomas, Sheriff, and draws no conclusions the liability, if any, of the County of Dallas, Texas for complying with the provisions of this judgment.

It is so ORDERED.

UNITED STATES DISTRICT JUDGE

DATE: May 30, 1979

D-1

TEXAS SHERIFFS AND THE ELEVENTH AMENDMENT: AN OVERVIEW

I.

The Sheriff is a State Officer

A. Constitution

Art. V, Section 23 (Office created as part of the State's Judicial Department)

B. Statutory Scheme: State Functions

1. *Title 81 (Jails)*
   a. Duties expressly stated (Art. 5116, Arts. 2.18, 2.19 C.C.P.)
   b. State agency to monitor (Art. 5115.1)
2. *Title 120 (Sheriffs)*
   a. Qualifications, duties, powers, all set by the state
   b. bond payable to Governor (Art. 6866)
3. *Code of Criminal Procedure*
   a. Tasked to prevent crimes and to aid in prosecution of offenses against the State Art. 1.03).
   b. Designated a Texas Peace Officer (Art. 2.12)
   c. Duties and powers enumerated (Arts. 2.13, 2.17).
4. *Recent Enactment*
   Sheriff (in certain counties) authorized to create civil service system (Art. 2372h-8)

C. Case Law

Fears (1888) (J.P.)
Clark (1899) (Sheriff)
Sullivan (W.D. Tex. 1978) (Sheriff)
Fullerton (1980) (Auditor)
Rheuark (5th Cir. 1980) (District Judge)
Familias Unidas (5th Cir. 1980) (County Judge)

II.

Counties are Arms of the State

A. Texas Law

1. *Constitution*
   Art. XI ("Subdivisions of the State")
   Art. IX (Counties)
2. *Legislation*
   Title 33 (Organization)
   Title 34 (Finances)
   Title 36 (Treasurer)
   Title 44 (Comm'r Court)
3. *Cases*
   *A mere division of the state. *Childress County* (Tex. 1936); *Limestone County* (1931); *Nueces County* (S.D. Tex. 1959)
   *Derivative branch. *Avery* (Tex. 1966); *Sullivan* (W.D. 1979)
   *Lack of general police power. *Canales* (1948); *Kaiser* (1929); *Harper* (5th Cir.)
   *Used as agencies for state-wide functions. *Rodriquez* (5th Cir. 1971); *McCombs* (1940)

B. U.S. Supreme Court

1. Agencies and departments of the state are not subject to Section 1983 suit. *Quern* (1979)
2. State law critical to resolution of issue. *Doyle* (1977); *Moor* (1973)

C. 5th Circuit

Political subdivision operating solely as governmental agency. Rodriquez (1971)

III.

Eleventh Amendment Immunity

A. Test

- *State law highly relevant. *Moor*
- *Real party in interest. *Jagnandan* (5th Cir.)
- *Is state inextricably involved? *Sessions* (1981)
- *Waiver must be clear. *Edelman* (1974)

B. Recognized as Applicable

1. Mississippi State University. *Jagnandan* (5th Cir. 1977)
2. University of California. *Vaughn* (E.D. Cal. 1981)
3. Texas A&M University. *Zentgraf* (S.D. Tex. 1980)
4. Texas counties *Sullivan* (W.D. Tex. 1979) and state hospital *Sessions* (1981)

C. Not Applicable

1. Texas Junior College. *Handler* (5th Cir. 1979) (primarily local institutions)
2. Kentucky counties. *Allsup* (E.D. Ky. 1980)
3. Indiana County Welfare Department. *Mackey* (7th Cir.)
4. Those "local government units which are not consider part of the State" *Monell* (1978)

Opposition

Supreme Court
FILED
JAN 11 1982
CLERK

No. 81-1086

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CARL THOMAS, SHERIFF,

Petitioner,

vs.

BENNY B. BARRETT, ET AL.,

Respondents

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 81-1086

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COMES NOW Respondent, Benny B. Barrett, individually and on behalf of the class of plaintiffs herein, and files his Opposition to Petitioner's Petition for a Writ of Certiorari, and would show as follows:

QUESTIONS PRESENTED

Counsel for Respondent strongly disagrees with the statement of the questions as phrased by Petitioner, and accordingly must rephrase them. The first question, for example, implies that the Eleventh Amendment issue was raised at the trial court and appellate court levels, which is not the case. Further, Petitioner Thomas was most emphatically *not* a state officer, nor did he perform state functions. To the contrary, it is quite clear from state law that the

Texas county sheriff is a county officer, whose law enforcement powers and duties are confined exclusively to the geographical limits of the county, and his other powers and authorities are also so confined. Not only was Petitioner not a state officer, in any sense of the word, it is also quite clear that Texas counties are not branches of the state sufficient to entitle them to Eleventh Amendment immunity; and even if they were, under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908) and *Hutto v. Finney,* 434 U.S. 678 (1978), as correctly applied by the Fifth Circuit in this case, Eleventh Amendment immunity is not available to Petitioner here.

Accordingly, although Respondent does not believe that there is an Eleventh Amendment issue presented for review by this Court, if there is it would have to be stated as follows:

I. WHERE THE COURT BELOW ONLY AWARDED ATTORNEY'S FEES AGAINST A TEXAS COUNTY, AND NOT BACKPAY, BECAUSE OF THE UNCONSTITUTIONAL CONDUCT OF A COUNTY SHERIFF ACTING IN HIS OFFICIAL CAPACITY; AND WHERE STATE FUNDS WERE NOT ORDERED TO BE USED TO PAY BACKPAY OR ATTORNEY'S FEES; AND WHERE TEXAS COUNTIES ARE BY LAW SEPARATE CORPORATE AND POLITICAL BODIES WITH THE AUTHORITY TO LEVY AND RAISE THEIR OWN TAXES; TO ESTABLISH AND SPEND BUDGETS; TO HIRE, FIRE AND APPOINT PERSONNEL; TO ENTER INTO CONTRACTS AND SELL PROPERTY; TO CONTROL THEIR OWN TREASURIES;

AND TO SUE AND BE SUED IN THEIR OWN NAMES; IS A TEXAS COUNTY OR COUNTY SHERIFF ENTITLED TO ELEVENTH AMENDMENT IMMUNITY, WHERE THE CLAIM WAS NOT RAISED IN THE TRIAL OR APPELLATE COURT BELOW?

As to the second question claimed to be presented by Petitioner, again Respondent cannot agree that this question is presented as framed. The issue as stated, as well as the argument thereunder, is a rather confused attempt to restate the waiver argument that was rejected by this Court in *Elrod v. Burns*, 427 U.S. 347, 360 (1976). Therefore, Respondent's response to Petitioner's claimed second question presented is:

II. THERE IS NO ISSUE PRESENTED FOR REVIEW REGARDING PETITIONER'S SECOND QUESTION, SINCE THIS ISSUE HAS BEEN DEFINITIVELY DISPOSED OF BY THIS COURT'S DECISIONS IN *ELROD V. BURNS*, 427 U.S. 347 (1976) AND *BRANTI V. FINKEL*, 445 U.S. 507 (1980).

As to the final question claimed to be presented by Petitioner, again Respondent must totally disagree that any such question is presented for review by this Court. The essence of Petitioner's contention is that because the law in the Fifth Circuit at the time of the trial of this case was assertedly that bad faith must be pleaded and proved by the plaintiff, rather than good faith being an affirmative defense which must be asserted by defendant, that he (Petitioner) should not be held to have waived it. This issue is foreclosed against Petitioner by the previous decision of this

Court in *Pierson v. Ray,* 386 U.S. 547 (1967), decided approximately twelve years before this case was tried. Therefore, Respondent's response to Petitioner' claimed third question presented is:

III. THERE IS NO ISSUE PRESENTED FOR REVIEW REGARDING PETITIONER'S THIRD QUESTION, SINCE THIS ISSUE HAS ALSO BEEN DEFINITIVELY DISPOSED OF BY THIS COURT'S DECISIONS IN *PIERSON V. RAY,* 386 U.S. 547 (1967) AND *GOMEZ V. TOLEDO,* 446 U.S. 635 (1980).

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1969), *cert. denied*, 397 U.S. 948 (1970) 9

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654 F.2d 304 (5th Cir. 1981) 6

Weber v. Barrett,
..... U.S. ....., 101 S. Ct. 1729 (1981) 1

RESPONSE TO JURISDICTIONAL STATEMENT

Although jurisdiction has been technically shown by Petitioner Thomas under 28 U.S.C. § 1254(1), it is Respondent's position that Petitioner has not shown the slightest reason for this Court to exercise its discretion to grant certiorari. Petitioner has not argued that the decision of the Fifth Circuit is in conflict with the decision of another federal court of appeals on the same matter, or that it is in conflict with any decision of a state court of last resort. Nor is there any assertion of any departure from the usual course of judicial proceedings, or of an important question of federal law. This appeal is another in a series of rather aimless appeals by Petitioner and other Dallas County officials, apparently designed to delay these proceedings as long as possible.

It should be noted that this appeal is a companion appeal to two other appeals, *Dallas County, Texas, et al v. Barrett and Collins, et al,* Nos. 81-989 and 81-990. In 81-989, Respondent will contend that there is no standing or jurisdiction to hear the appeal, because the Petitioners Dallas County, et al, are not parties to the suit below.[1] These appeals arise out of the same lawsuit, and involve the same basic facts. However, they will be responded to separately since they raise different questions, although the

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[1] Petitioners Dallas County, et al, sought to intervene after the trial on the merits in this case, but their intervention was denied by the trial and appellate courts, and this Court denied certiorari, on the issue of Respondent's entitlement to attorney's fees. *Weber v. Barrett,* ..... U.S. ....., 101 S. Ct. 1729 (1981). Petitioners Dallas County, et al, did not petition for certiorari on the denial of intervention, and therefore have no right to be before this Court, as will be argued in No. 81-989. The parties to the present appeal are the Respondent Benny B. Barrett, the class members who completed claim forms and were awarded backpay by the trial court, and Carl Thomas, former sheriff of Dallas County.

Eleventh Amendment and related issues will be responded to jointly in this response.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983,

41 U. S. C. § 1988,

Eleventh Amendment to United States Constitution.

STATEMENT OF THE CASE

Although Respondent cannot agree to the statement of the case as drafted by Petitioner, because it is inartfully drawn and inaccurate in many respects, we do agree that the statement of the course of these proceedings and of the relevant facts is accurately and completely set out in the opinion of the Fifth Circuit, Appendix A, at least up to that point. The Fifth Circuit did properly deny the Petitioner's motion for rehearing en banc on September 1, 1981, and his motion for stay of the mandate and to reconsider denial of rehearing en banc on October 2, 1981.

It should be emphasized that neither the Eleventh Amendment issue nor the qualified immunity issue was raised at the trial level, nor was the Eleventh Amendment issue raised at the appellate level. Nor was the assertion raised that Petitioner was not sued in his official capacity, or that Respondent did not properly plead a cause of action under 42 U.S.C. § 1983, as asserted by Petitioners Dallas County, et al, in No. 81-989. It should also be emphasized that the trial court did *not* enter judgment against Dallas County for backpay or attorney's fees, and

the Fifth Circuit only ordered the County to pay attorney's fees. (*See* Petitioner's Appendix C, at C-6; Appendix A, at A-20.)

REASONS FOR DENYING THE WRIT — SUMMARY OF RESPONDENT'S ARGUMENT

Only one issue is properly before this Court, and that is whether or not a Texas County sheriff sued individually and officially or the county itself is entitled to Eleventh Amendment immunity from a backpay and attorney's fee claim under 42 U.S.C. § 1983, where the court below awarded *only* attorney's fees against the county and *not* backpay, and where Texas counties meet none of the indicia this Court has set out as necessary to establish entitlement to Eleventh Amendment immunity. It is Respondent's position that Eleventh Amendment immunity is inapplicable to Texas counties and county sheriffs, but that even if it were, under the holdings of this Court in *Ex parte Young,* 209 U.S. 123 (1908) and *Hutto v. Finney,* 437 U.S. 678 (1978), it is unavailable to Petitioner because only an award of attorney's fees was made against county funds. It is fundamental that the Eleventh Amendment is not available to bar recovery of the backpay judgment against Petitioner personally, since the Eleventh Amendment can only be invoked to protect state funds.

Petitioner's other points are patently without merit, and are not reviewable because of settled law and the reviewing standards of this Court.

ARGUMENT

I. WHERE THE COURT BELOW ONLY AWARDED ATTORNEY'S FEES AGAINST A TEXAS COUNTY, AND NOT BACKPAY, BECAUSE OF THE UNCONSTITUTIONAL CONDUCT OF A COUNTY SHERIFF ACTING IN HIS OFFICIAL CAPACITY; AND WHERE STATE FUNDS WERE NOT ORDERED TO BE USED TO PAY BACKPAY OR ATTORNEY'S FEES; AND WHERE TEXAS COUNTIES ARE BY LAW SEPARATE CORPORATE AND POLITICAL BODIES WITH THE AUTHORITY TO LEVY AND RAISE THEIR OWN TAXES; TO ESTABLISH AND SPEND BUDGETS; TO HIRE, FIRE AND APPOINT PERSONNEL; TO ENTER INTO CONTRACTS AND SELL PROPERTY; TO CONTROL THEIR OWN TREASURIES; AND TO SUE AND BE SUED IN THEIR OWN NAMES; IS A TEXAS COUNTY OR COUNTY SHERIFF ENTITLED TO ELEVENTH AMENDMENT IMMUNITY, WHERE THE CLAIM WAS NOT RAISED IN THE TRIAL OR APPELLATE COURT BELOW?

At the outset of the discussion on this point, it should be reemphasized that this suit was brought against Petitioner individually and in his official capacity.[2] Further, although Petitioners Dallas County, et al, contested that Thomas was sued officially before the Fifth Circuit, and continue to contest it before this Court, the Fifth Circuit properly held that Petitioner was sued officially. *Barrett v. Thomas,* 649 F.2d 1193, 1201 (5th Cir.

[2] Petitioner was sued as "Carl Thomas, Sheriff", and it was stipulated that at all times material to this case he was acting under the color of state law, custom, or usage, as required by 42 U.S.C. § 1983. (Stip. 3, pre-trial order, R. 159-60).

1981) (Appendix A-19). Although as stated earlier, Respondent contends that Dallas County, et al, has no standing to appeal anything to this Court, since they are not and never have been a party to this suit, Respondent will reply to their petition, and on some points, such as the issue of Eleventh Amendment immunity, we will respond jointly to all briefs before this Court raising this and related issues.[3]

It is not surprising that Petitioner Thomas does not now nor has he ever denied that he was acting officially. This is to be expected, since he has relied on the Dallas County District Attorney's office throughout this litigation to represent him,[4] and certainly would not expect that office to suddenly assert that he was only acting personally — therefore should be left to pay this judgment out of personal funds. This fundamental fact pervades this whole case — that Thomas, a county official acting officially, committed unconstitutional acts against Respondents Barrett, Collins, et al, and the class, and at all times was defended by or had his defense paid for by the County of Dallas. It would be surprising to see the county bear this expense all the way through if they did not in fact think he was a county official, rather than a state official, which they and amicus now assert for the first time before this Court.

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[3] *Dallas County, et al v. Barrett & Collins, et al,* Nos. 81-989, 81-990; *Thomas v. Barrett, et al,* 81-1086; and amicus briefs of County Judges and Commissioners Association of Texas and Tarrant County, Texas.

[4] In Appeal No. 81-990, *Dallas County v. Thomas v. Collins* (hereinafter Collins), Thomas was initially represented by the Dallas County District Attorney's Office, but later his case was taken over by private counsel who was paid by the county.

(1) *Petitioners' arguments regarding Eleventh Amendment immunity are waived.*

Petitioners' and amicus' arguments can be loosely collected into two broad areas on the Eleventh Amendment point: Respondent did not adequately plead a case against Petitioner Thomas as a county official (as opposed to a state official) so as to bring this case under the ambit of *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); and Petitioner Thomas is not a county official but a state official, who was either acting in furtherance of state policy, or neither county or state policy. None of these claims were presented either to the trial or the appellate court,[5] and although Respondent concedes that waiver of the Eleventh Amendment issue will be seldom found, he strongly asserts that this potpourri of immunity arguments should be held waived in the present case, because of the conscious and systematic failure of any of the parties to raise them earlier. *But see Edelman v. Jordan,* 415 U.S. 651 at 677-678 (that the issue may be raised for the first time on appeal). However, Texas law allows counties to be sued in their own name, and according to amicus, even requires it. *See* amicus Association of Counties' brief, pp. 6-7; Tex. R. Civ. P. 33 ("Suits by or against a county or incorporated city, town or village shall be in its corporate name."); Tex. Rev. Civ. Stat. Ann. Arts, 1573, 1579. Thus the

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[5] Petitioners Dallas County, et al, raised the Eleventh Amendment point for the first time in their motion to stay the mandate of the Fifth Circuit, filed on or about September 9, 1981, but the Fifth Circuit rejected it, probably because they were persuaded by Respondent's contentions that it was inapplicable. This action by the Fifth Circuit came after they had remanded *Van Ooteghem v. Gray,* 654 F.2d 304 (5th Cir. 1981), indicating that they did not feel that *Van Ooteghem* applied to the present case.

Texas legislature has arguably waived by statute any Eleventh Amendment immunity that extends to counties. *Cf. Soni v. Board of Trustees of the Univ. of Tennessee,* 513 F.2d 347 (6th Cir.), *cert. denied,* 96 S. Ct. 2623 (1976). Therefore, although Eleventh Amendment immunity is unavailable to Petitioner Thomas or Dallas County, et al, for the reasons to be shown, even assuming it is available, it has been waived, both in this litigation and generally. At the very least, there is no reason for this Court to consider this issue here, because only attorney's fees were awarded against the County itself, under *Hutto v. Finney,* 437 U.S. 678 (1978).

(2) *Petitioner's arguments regarding pleading and party defects are waived.*

But clearly Petitioner Dallas County's and amicus' arguments regarding pleading or party defects are waived, since none of them were raised either in the trial court or the appellate court. Faced with a similar argument in *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977), where petitioners "failed to preserve the issue whether the complaint stated a claim upon which relief could be granted", *id.* at 281, this Court assumed without deciding that the suit had properly been brought.

Unless the defect is jurisdictional, it has been waived, and since plaintiff also pleaded jurisdiction under 28 U.S.C. § 1331, the complaint adequately alleged jurisdiction. In any event, the complaint quite clearly alleged a cause of action under 42 U.S.C. § 1983, by alleging that "Sheriff Thomas was at all times material hereto acting, in his position as Sheriff of Dallas County, under color of state

statute, ordinance, regulation, custom, or usage." (R. 1-9, para. VII, Appendix A to No. 81-989) This is true even under *Monell, supra. See also*: *Conley v. Gibson,* 355 U.S. 41, at 47-48 (1957). Even if Petitioners Dallas County, et al, were indispensable parties, which they were not, they would not be entitled to set aside a judgment following extensive litigation for that reason. *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). Moreover, since only a judgment for attorney's fees was entered against them, it is immaterial they were not a party under *Hutto v. Finney, supra.*

(3) *Eleventh Amendment immunity is unavailable either to Dallas County, et al, or to Sheriff Thomas.*

Petitioners argue variously that Texas counties are entitled to Eleventh Amendment immunity, because they are subdivisions of the state; Texas sheriffs are state officers not county officers, and thus entitled to assert Eleventh Amendment immunity; and that the actions of Petitioner Thomas constituted *neither* state nor county policy. These arguments will be dealt with seriatim.* Repeatedly and consistently the courts of this country, and this Court on numerous occasions, have held that a county does not enjoy the immunity conferred by the Eleventh Amendment. *See Lincoln County v. Luning,* 133 U.S. 529 (1890). More recently, in the case of *Edelman v. Jordan,* 415 U.S. 651, 667 n.12 (1974), this Court stated that "[A] county does not occupy the same position as a State for pur-

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*The latter assertion, made by Petitioners Dallas County, et al, at p. 23 of their brief, will be dealt with in Respondent's separate reply to the petition of Dallas County, et al, No. 81-989.

poses of the Eleventh Amendment." Some three years later this view was reconfirmed in *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977), where the Court held that "[t]he bar of the Eleventh Amendment . . . does not extend to counties . . . ."

More recently still, and perhaps in a sense of frustration, the Court stated that it has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties . . . even though such entities exercise a 'slice of state power'." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400 (1979). *See also Holley v. Lavine,* 605 F.2d 638 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980).

Traditionally, the force of the Eleventh Amendment is limited to suits "seeking to impose a liability which must be paid from public funds in the *state* treasury . . . ." *Quern v. Jordan,* 440 U.S. 332, 337 (1979) (emphasis added). In fact, shielding of the *state* treasury was a very purpose of enacting the Eleventh Amendment. *See, e.g., Jordan v. Gilligan,* 500 F.2d 701, 706 (6th Cir. 1974), *cert. denied,* 95 S. Ct. 1996 (1975).

As consistently noted, "[t]he most important factor in the determination of Eleventh Amendment immunity is whether the judgment will have to be paid from the *state* treasury." *Blake v. Kline,* 612 F.2d 718, 723 (3d Cir. 1979), *citing Urbano v. Board of Managers of New Jersey State Prison,* 415 F.2d 247 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970). It appears that only "when the action is in essence one of the recovery of money from

the *state,* the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity . . . ." *Ford Motor Company v. Department of Treasury,* 323 U.S. 459, 464 (1945) (emphasis added). If the claims asserted against the county can be satisfied with county funds, Eleventh Amendment immunity is inapplicable. *See Mackey v. Stanton,* 586 F.2d 1126, 1130-31 (7th Cir. 1978), *cert. denied,* 444 U.S. 882 (1979).

Admittedly, this lawsuit seeks funds from the county rather than the state treasury. In fact, all those features of local governments which have been looked to in order to determine whether or not the particular entity enjoys Eleventh Amendment immunity argue strenuously against such immunity on behalf of the county in this cause.

For instance, Texas counties are established as bodies corporate and politic; they may levy and raise their own taxes; they may establish and expend budgets; they may hire, fire and appoint personnel; they may enter into contracts and sell property; and, among other things, they control their own treasuries; and they may sue and be sued in their own names. *See generally* Tex. Rev. Civ. Stat. Ann. Art. 1539, *et. seq.* (Appendix B) In fact a Texas County is a municipal corporation by virtue of the Texas Constitution. Tex. Const., Art. XI; Tex. Rev. Civ. Stat. Ann. Art. 1572; *Brite v. Atascosa County,* 247 S.W. 878, 880 (Tex. Civ. App.— San Antonio 1921, *writ dism'd.*). *See also Lenoir v. Porter's Creek Water Shed Dist.,* 586 F.2d 1081, 1088-89 (6th Cir. 1978).

It should be noted that in the case of *Moor v. County of Alameda,* 411 U.S. 693 (1973), the

County of Alameda maintained that it was not a citizen for diversity purposes, but was merely the arm of the state because of its unique structure. This appears to be precisely what the present movants are arguing. After reviewing the numerous duties and powers possessed by the county, the Court concluded that such powers "strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California." *Id.* at 720. In summary, there is no doubt that the county in this case does not enjoy Eleventh Amendment immunity. Accordingly, it is a "person" for purposes of 42 U.S.C. § 1983. *See Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978).

However, even assuming counties have Eleventh Amendment protection, suits for injunctive relief are not barred by the Amendment. *See, e.g., Ex parte Young,* 209 U.S. 123 (1908). In addition to a judgment for backpay and attorney's fees, Respondent also obtained an injunction against enforcement of certain Dallas County personnel regulations. Nor does the Amendment bar the recovery of attorney fees and costs in connection with such a proceeding, whether or not the county is a party to the suit. *See, e.g., Hutto v. Finney,* 437 U.S. 678 (1978); *Gagne v. Maher,* 594 F.2d 336 (2d Cir. 1979, aff'd, 100 S. Ct. 2570 (1980). *Cf. Fitzpatrick* v. Bitzer, 427 U.S. 445 (1976) (Title VII). Even Amicus agrees with this. *See* amicus County Judges and Commissioners brief, p. 7.

Petitioner Thomas also seems to claim that he is entitled to Eleventh Amendment immunity personally, so as to protect him personally from pay-

ment of the backpay judgment against him. This is absurd; by its terms the Amendment requires that the state itself either be the real or nominal defendant, or that any recovery will come from the state. The judgment that Respondent and the class obtained against Petitioner individually is clearly recoverable from him individually, whether or not it is also recoverable from county funds. *See Scheuer v. Rhodes,* 416 U.S. 232, 238 (1974) (where the governor of Ohio and others were sued under § 1983 for damages, and the court held that the claim was not barred by the Eleventh Amendment because plaintiffs were "seeking to impose individual and personal liability on the named defendants"). His only personal defense was qualified immunity, which he waived.

Finally, the assertion that Texas sheriffs are state officers and not county officers is equally absurd. Moreover, it is waived because it was not asserted in any of the courts below. It is typical of the nature of the endless appeals that have plagued this litigation; each time one argument is rejected, others which have never been raised before are advanced. There is absolutely no reason for certiorari to be even considered on this issue, because of its patent absurdity. Apparently, because of the fact that some of the powers and authorities of sheriffs are derived from state statute, Petitioners contend that Thomas is thus a state officer; presumably therefore there is no liability under *Monell v Department of Social Services of the City of New York,* 436 U.S. 658 (1978) because no county official is acting, nor any county policy, custom or usage is involved.

However, if that argument were accepted, the logical result would be that there are *no* county officials — which would please Petitioners presumably because there would be no county liability. By this analysis, even the *county commissioners* would be "state officers", because their authority, as that of the sheriff and the treasurer, is entrusted to them by state statute. *Cf. Familias Unidas v. Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980). However, as noted by the Fifth Circuit in *Briscoe,* it is *county power* that the sheriff, the treasurer and the commissioners exercise — through which they have absolute control of county affairs, in the sheriff's case control of the hiring, demotion, transfer or discharge of his deputies. None of the sheriff's powers extend outside the county, and he is paid a salary by the county. *See generally* 52 Tex. Jur.2d, Sheriffs, Constables and Marshalls, § 1 *et seq.* As such, the court found (in dictum) the sheriff to be a *county official,* whose conduct could bind the county under *Monell.* The court stated:

> Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must **necessarily** be considered those of one 'whose edicts or acts may fairly be said to represent official county policy' for which the county may be held responsible under section 1983. (citing **Monell**) (emphasis added).

Id. at 404.

The *Briscoe* court went on to also state that "the State (of Texas) enjoys immunities not shared by its two political subdivisions," *id.,* and to hold that

because the county judge there was implementing a state policy *requiring* him to violate the plaintiff's First Amendment rights, that the county would not be held responsible for damages or attorney's fees. *Id.* at 405. *Briscoe* is totally distinguishable from the present case, and has repeatedly been miscited by Petitioners. Clearly, no state law or policy existed requiring Thomas to intentionally discriminate politically against his deputies, and the jury found that he did so, the trial court so held, and the appellate court agreed. Rather, Thomas, a county official exercising county personnel power of which he was the sole repository, violated the § 1983 rights of Respondent and the class. As such, the county is liable for attorney's fees,[7] whether or not they were a party to the suit.

II. THERE IS NO ISSUE PRESENTED FOR REVIEW REGARDING PETITIONER'S SECOND QUESTION, SINCE THIS ISSUE HAS BEEN DEFINITIVELY DISPOSED OF BY THIS COURT'S DECISIONS IN *ELROD V. BURNS*, 427 U.S. 347 (1976) AND *BRANTI V. FINKEL*, 445 U.S. 507 (1980).

Petitioner Thomas' point regarding this claimed issue, as summarized at page 28 of his brief, is that since Respondent and the class held their jobs at the pleasure of the sheriff under state law, they therefore had no right to complain of political discrimination against them; and that in any event since they were allegedly the alter egos of the sheriff under state law, they were such confidential

[7] Respondent has also filed a separate suit against Dallas County, et al, to recover the backpay due under this judgment, but that issue is not involved in this case.

and policy-making employees that they were not entitled to First Amendment protection.

However, after *Elrod v. Burns*, 427 U.S. 347, 360 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs. Moreover, the trial jury and court determined that the Petitioner was in fact motivated by political discrimination, and the appellate court upheld this determination. Thus, it is not appropriate for this Court to disturb the fact finding of the lower courts on this issue, absent exceptional circumstances, even if they are claimed to be clearly erroneous. *Branti v. Finkel*, 445 U.S. 507, n. 6 (1980).

Respondent therefore takes the position that no question is presented for review by this Court on the Petitioner's claimed second question, since the contention raised by Petitioner was properly rejected by the lower courts as a matter of fact and law, and these determinations are not reviewable by this Court according to its accepted standards of review.

III. THERE IS NO ISSUE PRESENTED FOR REVIEW REGARDING PETITIONER'S THIRD QUESTION, SINCE THIS ISSUE HAS ALSO BEEN DEFINITIVELY DISPOSED OF BY THIS COURT'S DECISIONS IN *PIERSON V. RAY*, 386 U.S. 547 (1967) AND *GOMEZ V. TOLEDO*, 446 U.S. 635 (1980).

The essence of Petitioner Thomas' final contention is that because the law in the Fifth Circuit at

the time of the trial of this case was asserted that bad faith must be pleaded and proved by the plaintiff, rather than good faith being an affirmative defense required to be pleaded and proved by defendant, he should not have been held to have waived it. However, this Court held in *Pierson v. Ray*, 386 U.S. 547 (1967), some twelve years before the present case was tried, that a police officer was entitled to assert qualified immunity, and made quite clear that it was an affirmative defense, which the police officer had the burden of proving. Likewise, the Fifth Circuit held in 1976, in a case dealing with this very sheriff's office, that the *defense* of qualified immunity was available to the Dallas County sheriff. *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) (en banc), *cert. denied*, 29 U.S. 865 (1976). Thus, there is simply no question at all presented for review by this Court on this issue, because it was settled law and had been for twelve years prior to the trial of this case that qualified immunity was an affirmative defense, and that the burden was on the defendant to plead and prove it. His failure to do so constituted waiver, and the Fifth Circuit properly so held.

REQUEST FOR ATTORNEY'S FEE

Respondent hereby requests the Court to establish and award an attorney's fee for services performed on this matter subsequent to Fifth Circuit affirmance. In the alternative, Respondent requests remand to the trial court for this purpose.

SUMMARY AND CONCLUSION

Because Respondent properly pleaded and proved a case of 42 U.S.C. § 1983 violations against Peti-

tioner in his individual and official capacities, Petitioner is individually liable for backpay and attorney's fees to Respondent and the class; and the county is also liable for attorney's fees, under the doctrine of *Hutto v. Finney, supra,* independent of any claim of Eleventh Amendment immunity. However, neither the Petitioner nor Dallas County are entitled to avail themselves of Eleventh Amendment immunity, because this suit is not against the state, nor does it seek recovery of state funds.

Respectfully submitted,

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James C. Barber
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Respondent's Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished to Mr. Earl Luna, 1525 Elm Street, Dallas, Texas 75201, Mr. C. J. Baldree, Dallas County Government Center, Dallas, Texas 75202, Mr. Tim Curry, 200 West Belknap, Fort Worth, Texas 76102 and to Mr. Jeff R. Boggess, 800 Baker Building, Fort Worth, Texas 76102-7071.

Date: .....

James C. Barber

Appendix

APPENDIX A

BENNY B. BARRETT, Plaintiff-Appellee
Cross-Appellant,

v.

CARL THOMAS, Sheriff, Defendant-Appellant
Cross-Appellee.

No. 79-3021.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 10, 1981.

Appeal was taken from a decision of the United States District Court for the Northern District of Texas, Robert W. Porter, J., which, inter alia, held unconstitutional certain personnel regulations of the sheriff's office of Dallas County, Texas, and which found that sheriff was liable to certain former deputies who were demoted or fired for their political affiliations. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad; (2) prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office; (3) Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations; and (4) attorney fees under Civil Rights Attorney's

Fees Awards Act could run against Texas county treasury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application.

Affirmed in part; vacated in part; reversed and rendered in part.

Brown, Circuit Judge, filed concurring opinion.

1. Constitutional Law — 90.1 (1)

Sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad. U.S.C.A. Const. Amend. 1.

2. Constitutional Law — 90.1 (1)

Prohibitions on "conduct subversive of the good order of discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office. U.S.C.A. Const. Amend. 1.

3. Constitutional Law — 90.1 (1)

Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and department morale, provided that those interests outweigh employee's interests in commenting on matters of public concern; however, in an effort to limit offensive speech, public employer may not employ a prophylactic approach that

prohibits constitutionally protected expression. U.S.C.A. Const. Amend. 1.

4. Constitutional Law — 90 (1)

Overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. U.S.C.A. Const. Amend. 1.

5. Constitutional Law — 90.1 (1), 91
Sheriffs and Constables — 21

Sheriffs, like other elected county officials in Texas, have wide-ranging discretion in selection of their employees and therefore deputy sheriffs have no legal entitlement to their jobs as public employees and may be fired for many reasons or for no articulable reason at all; however, sheriff may not condition continuation of public employment on an employee's relinquishment of First Amendment liberties of political belief and association. U.S.C.A. Const. Amend. 1.

6. Sheriffs and Constables — 21

Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations. U.S.C.A. Const. Amend. 1; Vernon's Ann. Tex. Civ. St. art. 6869.

7. Civil Rights — 13.10, 13.13 (1)

Qualified immunity is an affirmative defense to a section 1983 action and burden of pleading and proving it rests with defendant. 42 U.S.C.A. § 1983.

8. Federal Courts — 616

Sheriff, who was named defendant in section 1983 suit challenging certain personnel actions, was not entitled to claim defense of qualified immunity, which was raised for first time on appeal. 42 U.S.C.A. § 1983.

9. Civil Rights — 13.17

Although various class members did not prevail on every aspect of relief sought in section 1983 suit challenging disputed personnel actions taken by sheriff and constitutionality of certain personnel regulations of sheriff's office, favorable disposition of their claim for injunction against departmental conduct rules entitled them to recover attorney fees. 42 U.S.C.A. §§ 1983, 1988.

10. Civil Rights — 13.17

Attorneys fees under Civil Rights Attorney's Fees Awards Act could run against Texas county treasury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application. 42 U.S.C.A. §§ 1983, 1988; Fed. Rules Civ. Proc. Rule 24, 28 U.S.C.A.

Henry M. Wade, Criminal Dist. Atty., Charles J. Baldree, Asst. Dist. Atty., Dallas County Texas, Dallas, Sue L. Lagarde, Asst. Dist. Atty., Dallas, Tex., for defendant-appellant, cross-appellee.

James C. Barber, Steven B. Thorpe, Dallas, Tex., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, THORNBERRY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal, argued and decided in tandem with *Collins v. Thomas,* 649 F.2d 1203 (5th Cir. 1981), arises from disputed personnel actions taken by Carl Thomas during his tenure as Sheriff of Dallas County, Texas. It addresses the constitutionality of certain rules regulating the conduct of employees in the Dallas County Sheriff's Office, the merits of 42 U.S.C. § 1983 claims brought by former deputy sheriffs alleging that they were demoted or fired by Thomas for their political affiliations, and Dallas County's liability for a 42 U.S.C. § 1988 attorney's fees award against Sheriff Thomas. We vacate the district court's injunction against § 15 of the Sheriff's Office Code of Conduct; we believe § 15 is facially unobjectionable and constitutional as applied here. We reverse the district court's determination that Dallas County is not liable for the § 1988 award against Thomas and render judgment holding the County jointly and severally liable with the Sheriff for the attorneys' fees award. We affirm the district court's disposition of the remaining issues presented on appeal.

I. The Facts

Benny Bob Barrett joined the Dallas County Sheriff's Office ("the department") as a patrolman in May 1966. Barrett had compiled a solid work

record and advanced to the position of sergeant in the Criminal Investigation Division when Republican Carl Thomas defeated Clarence Jones, the Democratic incumbent, in the November 1976 election. After taking office, Thomas transferred Barrett, a Jones supporter, laterally to the Civil Warrants Division in March 1977. Later, in August of the same year, he was domoted to the position of detention officer.

Peeved by his demotion, which entailed reductions in pay, benefits, and prestige. Barrett told a newspaper reporter on August 20 that Thomas was a "paranoid" person with a "Hitler mentality". These remarks were quoted verbatim in a newspaper story published the same day. On August 22, Barrett went before a public meeting of the Dallas County Commissioners' Court to criticize Thomas for conducting a political purge in the Sheriff's Office. On August 23, Thomas fired Barrett. The discharge notice stated that Barrett's published remarks violated Dallas County Sheriff's Office Code of Conduct §§ 12 $ 15.[1]

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[1] § 12 provides: Gossip and Confidential Information

Gossiping about affairs of the department or the members of it, making unauthorized public statements, or the unauthorized revealing of confidential information of any kind, is prohibited.

a. No member of the department shall make known any information concerning the progress of an investigation, a known or reported law violation, or condition against which action is to be taken, at a future time, or any proposed Sheriff operation of any type, to any person not authorized to receive it.

b. It is expressly forbidden to give any lawyer, bondsman, or the agent of either, or any other person unauthorized information regarding prisoners in confinement.

§ 15 provides: Willful Disobedience or Insubordination

No member of the department, to whom a lawful order is addressed by a supervisory officer, shall willfully disobey that order, and no conduct sub-

Barrett brought this § 1983 class action on behalf of all sheriff's office employees who had been demoted or fired by Sheriff Thomas for supporting Sheriff Jones in the 1976 election. His original complaint alleged that, in firing or demoting employees who did not support him in the 1976 election, Thomas abridged first amendment speech and association rights. The complaint also challenged the constitutionality of personnel regulations governing public statements by Sheriff's Offiice employees, see n. 1, *supra,* on grounds of vagueness, overbreadth, and as impermissible prior restraints on protected speech.[2]

After issuing a preliminary injunction against enforcement of the challenged personnel regulations and certifying the plaintiff class, the trial judge presided over a jury trial on the merits in January 1979. In response to a series of interrogatories, the jury found that political considerations had motivated Thomas to transfer, demote, or dis-

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versive of the good order or discipline of the department will be tolerated.

Continuous or willful violations of this Code of Conduct are punishable under this rule.

a. No deputy shall use abusive, insulting, or indecent language to a supervisory officer.

Within a week of Barrett's firing, the Sheriff issued General Rules "to clarify," Thomas testified, the conduct proscribed by § 12 & 15. Thomas conceded on direct examination that, although these Rules were not in writing at the time Barrett was discharged, he considered them to be effective and enforceable against Barrett. Record, vol. III, at 95. Rules 1 and 2 provide:

1. No employee of this department will address any statement or remark to any member of the news media that is or could be of a controversial nature. All requests will be referred to the Sheriff even during my absence.

2. No member of this department will discuss any matters pertaining to policy or procedure of this department with any elected official or department head.

[2] The complaint also joined a pendant state law claim for defamation based on a press release issued by Thomas indicating that Barrett had been fired for being a "lazy individual." After prolonged deliberation, the jury was unable to reach a verdict on Barrett's defamation claim. The trial court then dismissed the pendant claim without prejudice.

charge various plaintiff class members.[3] The jury determined that political considerations were a motivating factor in Barrett's transfer and demotion, but that Thomas did not discharge Barrett for political reasons. The jury was instructed that the scope of law enforcement officers' free speech rights is circumscribed by a balancing test weighing the public interest in regulating such speech against the speaker's private interest in making the comments. Based on this instruction and the Sheriff's concession that Barrett was fired for calling Thomas a "paranoid" person with a "Hitler mentality," the jury determined that Barrett's criticism of Thomas was not protected speech.

On the basis of these jury findings, the district

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[3] Although Thomas failed to raise the objection at trial, he asserts on appeal that the trial court incorrectly worded the jury interrogatory asking whether the plaintiffs were wrongfully transferred, demoted, or discharged for exercising their constitutionally protected rights of speech and political association. Specifically, Thomas contends that the charge was defective because it inquired of the jury whether the plaintiffs' political affiliations and activities were "motivating factors" in their transfers, demotions, or discharges. The court advised the jury that the plaintiffs bore the burden of proof on this question. The Sheriff insists that a proper formulation of the question would have made clear that plaintiffs must prove that their constitutionally protected activities were either the "primary" or the "sole" cause of their firings or demotions.

These contentions are devoid of legal merit. In addition to the inquiry whether political considerations were "motivating factors" in the challenged personnel actions, the court submitted for the jury's consideration this question:

Do you find from a preponderance of the evidence that the defendant would have reached the same decision as to the class members' transfer, demotion or discharge absent consideration of the class members' political party affiliation, the failure to support the defendant, or the support of the defendant's opponent in the political campaign? (Burden of proof on defendant)

In its special verdict, the jury answered "no" to this question. As a matter of law, this formulation of the issue comports with the Supreme Court's holding regarding the nexus a public employee plaintiff must prove between his exercise of first amendment rights and an adverse personnel action. *Doyle v. Mt. Healthy City Board of Education*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977) (plaintiff must prove that protected activities were a "substantial factor" in the decision to discharge).

In any event, Fed.R.Civ.P. 51 precludes our consideration of this issue at the threshold. The Sheriff waived any error in the jury instructions by this failure to object at trial.

court struck down each of the challenged personnel regulations for vagueness and overbreadth. The court permanently enjoined further enforcement of the regulations and decreed that certain members of the plaintiff class who were fired or demoted for their political affiliations were entitled to reinstatement with back pay. The trial judge accepted the jury's verdict that Thomas had not fired Barrett for his political associations and that Barrett's remarks to the press were constitutionally unprotected.[4]

While the court found that Barrett was entitled to back pay compensating for his politically-inspired demotion, it denied him reinstatement to his former position. Attorney's fees were awarded to the prevailing plaintiffs. An April date was set for a hearing to fix the amounts of back pay and interest due each individual member of the plaintiff class and to review the attorney's fee request filed by the plaintiffs' attorney.

One week before the scheduled April hearing — more than three months after the jury trial — Dallas County moved to intervene. The County argued that an adjudication of Thomas' liability in its absence would impair its interest in protecting the County treasury against the plaintiffs' claims. The plaintiffs opposed Dallas County's intervention, contending that the County's motion was untimely, that the County's expressed disclaimer of liability for the sheriff's personnel decisions negated its assertion of an interest in the outcome of the April

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[4] The trial judge determined, notwithstanding the jury verdict, that Barrett's comments to the County Commissioners were protected. This finding did not obviate, however, the justification for Barrett's discharge upon his statements to the press.

hearing, and that the County interests were inadequately represented by the county district attorney's representation of the sheriff, who shared the County's interest in minimizing liability to the plaintiffs. Stressing that County intervention would pose the threat of a prejudicial delay at a time when the lawsuit was nearly resolved, the district court denied the motion to intervene.[5]

The district court then proceeded with the scheduled April hearing. In a judgment specifying the terms of relief granted to the members of the plaintiff class, the court, on May 20, ordered reinstatement of nine demoted or discharged employees and fixed the amounts of back pay and interest due fourteen members of the plaintiff class. The court fixed the plaintiff's attorney fee award at $34,015, but specified that the judgment "is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." Subsequently, in August, Judge Porter decided that the attorney's fees award would not lie against County funds, apparently because the plaintiff had affirmatively opposed the County's attempt to intervene prior to the April hearing.

On this appeal, the Dallas County District Attor-

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[5] The County brought an interlocutory appeal from this decision. This Court affirmed the district court's denial of the County's intervention motion withou a published opinion under F.R.A.P. 34(a) and 5th Cir. R. 18. The Supreme Court denied the County's petition for a writ of certiorari. *Weber* v. Barrett,.....U.S....., 101 S.Ct. 1729, 68 L.Ed.2d 218 (1981).

ney contends, *inter alia,*[6] that, (1) the personnel regulations enjoined by the district court are constitutional; (2) the sheriff's personnel actions were permissible; (3) the Sheriff is immune from this lawsuit; and (4) the attorney's fees award was improper because the plaintiffs did not "prevail" as required by 42 U.S.C. § 1988. The plaintiffs cross-appeal the trial court's determination that Dallas County is not liable for the attorney's fees award.

II. The Challenged Personnel Regulations

[1] The district court struck down each of the four Sheriff's Office personnel rules, *see* n.1 *supra,* challenged by the plaintiffs for overbreadth and vagueness.[7] Of course, either vagueness or overbreadth standing alone would present a fatal defect in the regulations. While the district court may well have been correct in concluding that three of the challenged regulations are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1925), we do not reach that question with respect to § 12 of the Sheriff's Office Code of Conduct or General Rules 1 and 2. We affirm the judgment below invalidating these regulations on the premise that these three "sweep unnecessarily broadly and thereby

[6] Appellants raise questions going to aspects of the relief granted to plaintiff class members. Masters, Smith, Lowther, and Baker. They also insist that the district court erred in finding, notwithstanding the jury's verdict, that Barrett's comments to the County Commissioners' Court were constitutionally protected speech. Upon review of the record and the trial judge's lucid memorandum opinion, we find these contentions meritless and summarily affirm the district court.

[7] The district court declined to reach plaintiffs' claim that the regulations also imposed constitutionality impermissible prior restraints. The issue is not before us on appeal.

invade the area of protected freedom." *NAACP v. Alabama,* 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed2d 325 (1964).

[2] Section 15, however, is a different story. We find the prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" facially constitutional in the context of rules regulating police department conduct. *Cf. Kannisto v. City and County of San Francisco,* 541 F.2d 841 (9th Cir. 1976), *cert. denied,* 430 U.S. 931, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977) (upholding police officer's discharge for breach of regulation forbidding conduct "which tends to subvert the good order, efficiency, or discipline" of the police department). While we can envision circumstances in which § 15 would be unconstitutionally vague or overbroad as applied,[*] this case does not present that problem. We are reluctant to circumscribe narrowly the sheriff's discretion in promoting the legitimate ends of "discipline, esprit de corps, and uniformity" among his law enforcement officers. *Kelley v. Johnson,* 425 U.S. 238, 246, 96

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[*] *E. g., Bence v. Breier,* 501 F.2d 1185, 1193 (7th Cir. 1974), *cert. denied,* 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821 (1975) (police department regulation prohibiting "conduct unbecoming a member and detrimental to the service" unconstitutionally vague as applied to police officers who wrote a letter to a labor negotiator regarding terms of their employment).

Had Barrett been dismissed for his appearance before the County Commissioners on the basis of § 15 alone, we would have no hesitation in declaring the admittedly elastic language of the regulation unconstitutionally overboard as applied. Similarly, the prohibition of acts subversive of good order might well be stretched to proscribe conduct in a manner that would render the regulation unconstitutionally vague as applied. In this case, however, Barrett's termination cited conduct (i.e. his remarks to the press) to which § 15 can properly be applied.

S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976).[9] Therefore, we reverse that portion of the district court's judgment holding § 15 unconstitutional and vacate the provision of its permanent injunction barring enforcement of § 15.

[3] The First Amendment freedoms infringed by the other challenged regulations are not absolute. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and departmental morale, provided that these interests outweigh the employee's interests in commenting on matters of public concern. *Id.* Yet, in an effort to limit offensive speech, the public employer may not employ a prophylactic approach that prohibits constitutionally protected expression. *See Grayned v. City of Rockford,* 408 U.S. 104, 114-19, 92 S.Ct. 2294, 2302-05, 33 L.Ed.2d 222 (1972). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v.*

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[9] We are not equating the peculiar milieu of a law enforcement agency to military service. *Kannisto v. City and County of San Francisco,* 541 F.2d at 843. The Supreme Court has firmly held that police officers enjoy the full complement of First Amendment Protections. *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). The public employer's interest in regulating the speech of police officers does not rise to the level of the government's interest in regulating the conduct of military personnel. See *Brown v. Glines,* 444 U.S. 348, 354, 100 S.Ct. 594, 599, 62 L.Ed.2d 540 (1980); *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Davis v. Williams,* 617 F.2d 1100, 1104 (5th Cir. 1980) (en banc), *cert. denied,* .....U.S....., 101 S.Ct. 336, 66 L.Ed.2d 160 (1980) ("[W]e are loathe to equate a municipal fireman with a paratrooper or even with such a quasi-soldier as the recalcitrant officer-dermatologist Levy.").

Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963).

[4] The overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. Parts of Section 12 and General Rules 1 and 2 collide with this barrier. Section 12 flatly prohibits "unauthorized public statements." General Rule 1 denies department employees their right to speak to reporters on any topic "that is or could be of a controversial nature." General Rule 2 forbids discussions of Sheriff's Office policy or procedure with "any elected official." Section 12 and Rules 1 and 2 are facially overbroad. They explicitly forbid acts that departmental employees have a clear constitutional right to do. Although promoting loyalty, discipline, and efficiency in the department is a legitimate goal, these rules sweep beyond their intended ambit and impermissibly chill protected speech by the department's employees.

III. Executive Discretion and Patronage Dismissals

The trial judge instructed the jury that Barrett and the plaintiff class bore the burden of proof in establishing that Sheriff Thomas' personnel actions were politically motivated patronage firings. The jury found that plaintiffs had carried their burden. Yet, Thomas insists that the broad discretion vested in Texas county sheriffs by Tex.Rev.Civ.Stat.Ann. art. 6869 (Vernon 1960) authorizes his conduct. Under art. 6869, deputies serve "at the pleasure" of the sheriff.

[5, 6] Sheriffs, like other elected county officials in Texas, have indisputably wide-ranging discretion in the selection of their employees. *Familias Unidas v. Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980). It follows that deputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all. Nevertheless, there are overriding limits on the sheriff's discretion in employment matters. He may not condition continuation of public employment on an employee's relinquishment of the First Amendment liberties of political belief and association. *Perry v. Sinderman,* 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972). The establishment of a political orthodoxy among public employees by an executive official is constitutionally impermissible.

The facts and legal claims presented in this case are strikingly similar to those confronted by the Supreme Court in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Republican non-civil-service employees of the Cook County, Illinois, Sheriff's Office who had been swept out of their jobs in the wave of political patronage hirings and firings following the replacement of the incumbent Republican sheriff with a Democrat sued Sheriff Elrod for depriving them of their constitutionally protected rights to affiliate with a political party of their choice. Five members of the Supreme Court joined in holding these patronage firings unconstitutional deprivations of political liberty.

The plurality opinion noted that political patronage dismissals restrict the individual liberties of belief and association at the core of the First

Amendment. While these rights are not absolute, they may not be trenched upon absent a showing that the liberty-restraining patronage system furthers "some vital government end by a means that is least restrictive of freedom of belief and association. . . ." *Id.* at 363, 96 S.Ct. at 2685. Sheriff Thomas has not pointed to a vital governmental interest served by making his deputies toe the prescribed political line. He has likewise not shown that such line-toeing is the least restrictive means of achieving a legitimate objective.

This Court recently addressed § 1983 claims regarding political patronage firings emanating from the Lake County, Florida, Sheriff's Office. *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980). In holding that the *Tanner* plaintiffs had failed to meet the burden of making a prima facie showing that Sheriff McCall's personnel decisions were motivated by political animus, the Court set out a legal blueprint for applying *Elrod v. Burns* principles to § 1983 claims alleging political partonage dismissals. *Tanner* contemplates a three-step inquiry on review. First, have the plaintiffs alleged conduct that, if proven, would constitute an infringement of their constitutional rights? Second, have the plaintiffs made a prima facie showing that impermissible political animus, motivated the challenged personnel decisions? Finally, have the defendants rebutted such a showing with sufficient evidence of non-political motives for the challenged conduct?

The pleadings filed by Barrett and the plaintiff class properly put in issue the constitutional claim. The trial record amply supports the jury's finding that the constitutionally protected political activ-

ities or associations of Barrett and the plaintiff class were motivating factors in Sheriff Thomas' personnel decisions. On these facts, the plaintiffs have met their burden of pleading and proving a deprivation of constitutional rights motivated by political animus. Sheriff Thomas, on the other hand, has failed to rebut this showing to the jury's satisfaction with evidence "that the same employment decisions would have been reached regardless of the constitutionally protected conduct." *Tanner v.MCall,* 625 F.2d at 1190. Therefore, affirmance of the jury's verdict is warranted.

Nevertheless, the Sheriff insists that his deputies are not entitled to the usual degree of protection from the changing tides of political fortune. Sheriff Thomas maintains that his deputies are confidential, policymaking employees within the exceptional class of public servants of whom political allegiance may be demanded. *See Elrod v. Burns,* 427 U.S. at 364-68, 96 S.Ct. at 2685-87; *Stegmaier v. Trammell,* 597 F.2d 1027 (5th Cir. 1979).

The Supreme Court recently refined the process of identifying those employees to whom the policymaker classification should be applied. *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In dismissing the labels "confidential" and "policymaker" as irrelevant, the Court declared, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295. The terms "confidential" and "policymaker" illuminate the contours of the employee class that may permissibly be subjected to a polit-

ical litmus test, but any specific application of the exception must turn on the importance of political loyalty to the excution of the employee's duties.

The job duties of the plaintiff class range from clerical work to law enforcement. They are precisely the same duties performed by the plaintiffs in *Elrod v. Burns,* where the confidential and policy-making exception was deemed not to apply. Sheriff Thomas offers no satisfying justification for demanding greater political loyalty from his deputies than Sheriff Elrod was entitled to expect from his employees. In a sheriff's deparment with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an itimate working relationship. The rule of *Elrod v. Burns,* not the exception, applies here.

IV. Immunity

Falling back to his next line of defense, Sheriff Thomas seeks "the Court's indulgence" in raising — for the first time on appeal — the defense of qualified official immunity. The Sheriff, as an executive official of Dallas County, is entitled to claim immunity from suits over good faith acts performed in furtherance of his governmental duties. *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[7, 8] Qualified immunity ,however, is an affirmative defense; the burden of pleading and proving it rests with the defendant. *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 (1980). Sheriff Thomas' failure to interpose the immunity defense until this appeal leaves this court

with no record to review on the question at the core of this defense: were Sheriff Thomas' actions based on a reasonable belief that the demotions, transfers, and dismissals were lawful? The court below did not explore this issue of fact and law — it was not raised. Powers of mystical insight, not mere "indulgence," would be necessary for us to accommodate the sheriff's request that we consider his belated immunity claim for the first time on appeal. We properly refrain from this suggested adventure in mysticism. It comes after the opportunity to litigate the issue has ended.

V. Attorney's Fees

Finally, we turn to the parties' conflicting contentions on whether the district court should have awarded attorney's fees to plaintiffs' counsel under 42 U.S.C. § 1988, and, assuming the award was proper, whether it may be recovered from the county treasury.

[9] Sheriff Thomas, clinging to the defenses we have found to be meritless, maintains that the plaintiffs are not "prevailing parties" within the meaning of § 1988. Although various members of the plaintiff class, including Barrett, did not prevail on every aspect of the relief sought, the favorable disposition of their claim for an injunction against the departmental conduct rules, discussed in Part II, *supra,* entitles the plaintiffs to recover attorney's fees under § 1988. *Coen v. Harrison County School Board,* 638 F.2d 24, 26 (5th Cir. 1981) (per curiam). The district court's decision to award attorney's fees to plaintiffs' counsel merits our affirmance. The amount awarded is not an issue.

[10] The question remains whether the attorney's fees award lies against Dallas County. Sheriff Thomas possessed complete authority to hire and fire the plaintiff class members under art. 6869. Under this Texas law, his "acts or edicts may fairly be said to represent official [County] policy." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). It is now settled law that a § 1988 attorney's fees award may run against a public treasury for § 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit. *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522 (1978).

The issue presented here is whether deviation from the *Hutto v. Finney* rule is warranted when Dallas County, whose treasury is otherwise vulnerable to the fee award, was denied an opportunity to intervene in the late stages of this litigation in part because the plaintiffs opposed the County's intervention. The district court decided that plaintiffs could not satisfy their attorney's fee award against the County treasury. While § 1988 vests discretion over a fee award in the trial court, the prevailing party is ordinarily entitled to recover a fee unless special circumstances render the award unjust. *Morrow v. Dillard,* 580 F.2d 1284, 1300 (5th Cir. 1978). Finding no justification here for denying the prevailing plaintiffs their attorneys fees, we reverse the district court's refusal to hold Dallas County jointly liable with Sheriff Thomas for the fee award.

Measured against the standards for timely Fed.

R.Civ.P. 24 intervention established in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), Dallas County's motion to intervene was clearly tardy. This suit was pending for two years and had been tried on the merits before the County's motion was filed. Moreover, the County's interests were adequately represented at each stage of the proceedings by the county district attorney's representation of Sheriff Thomas. *Cf. Hutto v. Finney*, 437 U.S. at 699, 98 S.Ct. at 2578 (stressing that the State of Arkansas' interests had been represented throughout the litigation by the State Attorney General's representation of the Department of Corrections officials). The denial of the County's motion to intervene and the plaintiffs' opposition to the intervention do not render an award running against the County unjust under these circumstances.

Dallas County stands to suffer no more severe budgetary disruption than any public entity held liable under *Hutto v. Finney* for the § 1983 violations of its official policy-makers. Nothing the Supreme Court's observations on the inherent unfairness of awarding attorney's fees against the public officials individually without permitting the claim to run against the public entity, *Hutto v.* Finney, 437 U.S. at 699 n. 32, 98 S.Ct. at 2578 n. 32, we hold that the district court abused its discretion in refusing to enter judgment allowing the attorney's fees award to run against Dallas County. Therefore, we reverse and render judgment holding Dallas County jointly and severally liable for the § 1988 attorneys fees awarded plaintiffs' counsel in this action.

To summarize our holding, we affirm the judgment below in all but two respects. We vacate the portion of the trial court's injunction invalidating § 15 of the Sheriff's Office Code of Conduct. We reverse and render judgment on Dallas County's liability for the § 1988 attorneys fees award to plaintifs' counsel.

AFFIRMED IN PART; VACATED IN PART; REVERSED AND RENDERED IN PART.

JOHN R. BROWN, Circuit Judge, concurring:

I concur fully in sections I through IV of the Court's opinion, but specially concur in section V because bound by *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980), repeated in *Van Ooteghem v. Gray,* 628 F.2d 488 (5th Cir. 1980).[1]

My problem is that in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), finding county or municipal entities to be a "person" under § 1983, the Supreme Court confines this new-found liability to situations in which the action represents official policy, not just the unconstitutional act of an officer or agent of the entity.[2]

It seems incongruous to me that the Supreme Court meant to hold that Congress intended action to be that of the entity as a sort of "official" govern-

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[1] Vacated on grant of Rehearing En Banc now pending before the full Court.

[2] The Court stated:
We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the government as an entity is responsible under § 1983.
98 S.Ct. at 2038.

mental policy when the officer-agent is acting in a crass, flagrant violation of established constitutional rights. Especially is this true since, under *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), such an official (and hence the City, County entity) is denied the defense of good faith immunity when sued in an official capacity. See *Universal Amusement Co. v. Hofheinz,* 646 F.2d 996, 997 (5th Cir. 1981); *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980).

The public treasury is made to bear the consequences of actions by an officer-agent no matter how flagrant or spectacular the unconstitutional conduct might have been on the theory that somehow such person is carrying out the official governmental policy of the entity.[3]

[3] Lurking also is the question of the Eleventh Amendment, which, for the present, I do not discuss.

APPENDIX B

ARTICLE XVI, § 61, TEXAS CONSTITUTION

§ 61. Compensation of district, county and precinct officers; salary or fee basis; disposition of fees

Sec. 61. All district officers in the State of Texas and all county officers in counties having a population of twenty thousand (20,000) or more, according to the then last preceding Federal Census, shall be compensated on a salary basis. In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1949; and in counties having a population of less than twenty thousand (20,000), according to the then last preceding Federal Census, the Commissioners Courts shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts to compensate all sheriffs, deputy sheriffs, county law enforcement officers including sheriffs who also perform the duties of assessor and collector of taxes, and their deputies, on a salary basis beginning January 1, 1949.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is com-

pensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis. Added Aug. 24, 1935, as amended Nov. 2, 1948.

TEXAS REV. CIV. STAT. ANN.

Art. 1552. [1344] [768] Tax for pro-rata indebtedness

When any county has organized, the commissioners court of such county shall levy and have collected on all property in this county such rate of taxation to pay the pro rata share of the debt due by such county as the commissioners court of the parent county shall levy on property in said parent county to pay such debt. Id.

Art. 1553. [1346] [770] County bonds held by school funds

When any new county has been created wholly out of an existing county, if any bonds were legally issued by the parent county prior to the severance of a part of its territory, such of said bonds and the coupons due thereon as are held by the school fund of this State shall be apportioned by the Comptroller between the parent county and the new county on the basis now provided by law. Acts 1891, p. 39; G.L. vol. 10, p. 41.

Art. 1554. [1347] [771] Levy of tax for debt

The commissioners court of the parent county, or of any county created out of the parent county, which has now or may hereafter be organized, shall levy and have collected on all property in such county a tax to pay such county's pro-rata share of the

debt. The commissioners court of a county to which any unorganized county may be attached for judicial purposes shall levy and have collected on all property in said unorganized county owned by resident citizens thereof a tax for the purpose of paying said county's part of the debt. It shall be the duty of the Comptroller to assess and collect on all property in such unorganized counties owned by nonresidents, a tax to pay said counties' pro-rata part of said debt. Nothing herein shall be held to authorize the levy and collection of any tax in excess of that now allowed by the Constitution of this State. Id.

Art. 1572. [1365] [789]
[676] County a body corporate

Each county which now exists or which may be hereafter established, shall be a body corporate and politic. P.D. 1044.

Art. 1573. [1366] [790]
[677] Suits against

No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the commissioners court for allowance, and such court shall have neglected or refuse to audit and allow the same, or any part thereof. P.D. 1045.

Art. 1576. [1369] [793]
[680] Validity of deed, etc.

All deeds, grants and conveyances heretofore or hereafter made and duly acknowledged, or proven, and recorded as other deeds of conveyance, to any county, or to the courts or commissioners of any county, or any other person or persons, by whatever

form of conveyance, for the use and benefit of any county, shall be good and valid to vest in such county in fee simple or otherwise all such right, title, interest and estate as the grantor in any such instrument had at the time of the execution thereof in the lands conveyed and was intended thereby to be conveyed. P.D. 1051.

Art. 1577. [1370] [794]
[681] Sale or lease of real estate

The Commissioners Court may, by an order to be entered on its minutes, appoint a Commissioner to sell and dispose of any real estate of the county at public auction, and notice of said public auction shall be advertised at least twenty (20) days before the day of sale, by the officer, by having the notice thereof published in the English language once a week for three (3) consecutive weeks preceding such sale in a newspaper in the county in which the real estate is located and in the county which owns the real estate, if they are not the same. The deed of such Commissioner, made in conformity to such order for and in behalf of the county, duly acknowledged and proven and recorded, shall be sufficient to convey to the purchasers all the right, title, and interest and estate which the county may have in and to the premises to be conveyed. Provided, however, that where abandoned right-of-way property is no longer needed for highway or road purposes and the county decides to sell said right-of-way property, it shall be sold with the following priorities: (1) to abutting or adjoining landowners; (2) to the original grantors, his heirs or assigns of the original tract from whence said right-of-way was conveyed; or (3) at public auction as provided

above. Nothing contained in this Article shall authorize any Commissioners Court to dispose of any lands given, donated or granted to such county for the purpose of education in any other manner than shall be directed by law. As amended Acts 1949, 51st Leg., p. 904, ch. 485, § 1; Acts 1953, 53rd Leg., p. 447, ch. 133, § 1.

Art. 1577a. Validation of sales, when Commissioner not appointed

In all cases wherein the Commissioners Court of any county, acting as such court or through some individual or individuals appointed by it for such purposes, has sold, or attempted to sell, any land, or interests in land, belonging to such county; and where such Commissioners Court shall have failed to appoint a Commissioner to sell and dispose of such real estate belonging to said county, at public auction; and where such Commissioners Court gave notice of its intention to sell such lands, describing the same, by publication of such notice in some newspaper published in the county, having a general circulation therein, once a week for a period of three (3) consecutive weeks, designating the time and place after such publication where such Commissioners Court would receive and consider bids for the same; and where, on the date specified in such notice, such Commissioners Court received and considered any and all bids submitted for the purchase of said lands, or any portion thereof which were advertised for sale; and where such Commissioners Court, in its discretion, awarded such land, or any part thereof to the highest bidder submitting a bid therefor; and where the consideration thus bid and accepted was received by such county; and

where such Commissioners Court or some person or persons thereunto authorized by order of such Commissioners Court, made, executed, acknowledged and delivered to such successful bidder a deed or other instrument of conveyance purporting to convey to such purchaser the said property; and where more than three years have elapsed since the date of the execution and delivery of such deed or instrument of conveyance: that such sales and conveyances, or attempted sales and conveyances, are hereby in all things validated. Provided that nothing in this Act shall be construed as validating any sale or attempted sale of any lands given, donated or granted to such county for the purpose of education, made in any other manner than is directed by law; and provided further, that this Act shall not apply to any sale or conveyance the validity of which is involved in any litigation pending at the time this Act becomes effective. Acts 1951, 52nd Leg., p. 177, ch. 112, § 1.

Art. 1577b. Validation of sales and conveyances; purchasers in adverse possession

In all cases where the County Court or Commissioners Court in any county of this State acting as such court has sold or attempted to sell land or interest therein belonging to said County to any person, firm or corporation and where the County Court or Commissioners Court has made, executed, acknowledged, and delivered to any such person, firm or corporation an instrument of conveyance purporting to convey to a purchaser title to such property, and where such purchaser or his successors have held peaceable and adverse possession, using, enjoying and cultivating such property for a

period of ten (10) years or more, then such sales, attempted sales and conveyances are hereby validated. Acts 1961, 57th Leg., p. 1121, ch. 509, § 1.

Art. 1578. [1371] [795]
[682] Contracts with a county valid

Any note, bond, bill, contract, covenant, agreement or writing, made or to be made, whereby any person is or shall be bound to any county, or to the court or commissioners of any county, or to any other person or persons, in whatever form, for the payment of any debt or duty or the performance of any matter or things to the use of any county, shall be valid and effectual to vest in said county any right, interest and action which would be vested in any person if any such contract had been made directly with him. P.D. 1053.

Art. 1579. [1372] [796]
[683] Suits on writings by county

Suits may be begun and prosecuted on such notes, bonds, bills, contracts, covenants, agreements, and writings, in the name of such county, or in the name of the person to whom they were made for the use of the county, as fully and as effectually as any person may or can sue on like instruments made to him. P.D. 1054.

Art. 6865. [7119] [4890] Election and term

The qualified voters of each county at each general election shall elect one sheriff for a term of two years. Const. art. 5, sec. 23; Acts 1846, p. 265; P.D. 5108; G.L. vol. 2, p. 1571.